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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

FRIEDRICH FLICK,

Petitioner,

v.

LOUIS A. JOHNSON, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Friedrich Flick, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the District of Columbia Circuit, dated May 11, 1949, which affirmed an order of the United States District Court for the District of Columbia dismissing his petition for writ of habeas corpus.

Opinions Below

The District Court ruled that it lacked jurisdiction to entertain the petition on the *sole* ground that petitioner

was confined outside the territorial bounds of the District of Columbia. Its opinion appears in the Record (pp. 16-20).

The United States Court of Appeals held that the District Court *did have* jurisdiction and then proceeded to decide the controversy upon the merits without remanding the case to the District Court for hearing, thereby depriving the petitioner of the opportunity of submitting evidence in support of his contentions. The opinion of the appellate court is reported in 175 F. (2d) ——, and is also printed as an addition to the Record (pp. 181-185).

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, as amended by the Act of June 25, 1948 (Title 28, U. S. C. 1254) formerly Judicial Code, Section 240a. The petition for the writ of habeas corpus was filed pursuant to the provision of the Habeas Corpus Act, 28 U. S. C., Chapt. 153, formerly 28 U. S. C., Chapt. 14.

By order dated 19 July 1949, the Chief Justice of the United States extended the time for the filing of this petition for certiorari to and including September 8, 1949.

Statement of Facts and Matters Involved

Friedrich Flick, the petitioner herein, is a German national, 66 years of age. From 1925 to the time of his arrest by the United States Military Authorities on 13 June 1945 he was one of Europe's great industrialists, controlling a far flung industrial empire. He was a resident of Germany since birth. He was not in the military service, but lived during the war as any other private citizen.

At the conclusion of hostilities, petitioner was arrested along with many thousands of other German nationals. He was held in close confinement under stern control and

denied all privileges usually afforded prisoners of war.[1] He was thus held in the United States zone of occupied Germany from 13 June 1945 to the conclusion of his trial before a United States military court on 22 December 1947. He is presently confined in the custody of the United States Army at Landsberg prison, which is located in the United States zone of occupied Germany and controlled *solely* by the United States military authorities.

For almost two years prior to his trial petitioner was subjected to repeated interrogation by agents of the War Department and denied access to counsel and to members of his family. On February 10, 1947 he was handed a copy of his "indictment" brought by the United States charging him and several other German nationals with every conceivable offense that the wit of man has been able to devise, most of which alleged offenses were created by military fiat after the conclusion of World War II. His trial admittedly was not conducted in accordance with American judicial practices nor before a tribunal authorized and composed in accordance with American law, although the proceedings were conducted by the United States and in the name of the United States alone (R. 13, 30, 50, 115).

The tribunal was labeled as being "a United States Military Tribunal" but given international flavor only after it became obvious that its proceeding could not be sustained *legally* as an American institution. The facts relative to

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[1] Mr. Justice Jackson, in his report to the President dated 6 June 1945 (Dept. of State Pub. 3080, p. 45), stated in part: "The custody and treatment of war criminals and suspects appeared to require immediate attention. I asked the War Department to deny those prisoners who are suspected war criminals the privileges which would appertain to their rank if they were merely prisoners of war; to assemble them at convenient and secure locations for interrogation by our staff; to deny them access to the press; and to hold them in the close confinement ordinarily given suspected criminals. The War Department has been subjected to some criticism from the press for these measures, for which it is fair that I should acknowledge responsibility. * * * I have assurances from the War Department that those likely to be accused as war criminals will be kept in close confinement and stern control."

its creation, composition, procedure and judgment are set forth in the brief attached in support of this petition and no useful purpose will be served by here repeating them. Suffice it to say that U. S. Military Tribunal IV, as it was called, was created by U. S. Military Authorities pursuant to U. S. Military Government Ordinance No. 7. This decree was issued by the American Commander of the U. S. Zone of Occupied Germany in his capacity as U. S. Military Governor and not as a representative of any other nation or group of nations (R. 20-30). It declared that no appeal be allowed (R. 27), but that the sentence be subject to review solely by our Military Commander if the tribunal was American (R. 27) or "jointly by the Zone Commanders of the nations involved" if the tribunal were multi-national (R. 28). Here the review of the sentence was by General Lucius D. Clay alone, acting exclusively in his capacity as Commanding General of the United States forces in the American Zone of Occupied Germany and as the Military Governor of the area.[2]

The prosecution was by the United States alone (R. 130) and the court members were all United States citizens

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[2] "In the case of the United States of America vs. Friedrich Flick, et al. Berlin, Germany, Military Tribunal IV.

ORDER WITH RESPECT TO SENTENCE OF FRIEDRICH FLICK

In the case of the United States of America against Friedrich Flick, et al., *tried by the United States Military Tribunal IV, Nurenberg, Germany,* the defendant Friedrich Flick, on 22 December 1947, was sentenced by the Tribunal to imprisonment of 7 years. A petition to modify the sentence, filed on behalf of the defendant by Dr. Rudolf Dix, his defense counsel, has been referred to me pursuant to the provisions of Military Government Ordinance No. 7. I have duly considered the petition and the record of the trial, and in accordance with Article XVII of said Ordinance, it is hereby ordered that:

The sentence imposed by Military Tribunal IV on Friedrich Flick be, and hereby is, in all respects confirmed.

/s/ Lucius D. Clay
LUCIUS D. CLAY
General, U. S. A.
Commander-in-Chief, European Command
and Military Governor"

(R. 175). The conclusion is inescapable that the tribunal before which the petitioner was tried was not an "international" or multi-national court, as claimed, but one created and constituted by U. S. Military Authorities in contravention of the Constitution and laws of the United States and in contravention of the treaties and an international executive agreement covering the subject.[3]

The imprisonment of the petitioner is illegal and the Courts below erred in failing to grant a writ of habeas corpus:

First, because the tribunal which tried him not only lacked jurisdiction over the person and the subject matter but was composed and organized in contravention of the Constitution and laws of the United States; in contravention of the laws of nations and in contravention of international treaties and agreements to which the United States was a party.

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[3] The London Agreement dated August 8, 1945, which was incorporated into Control Council Law No. 10, provided that no "International courts" for the trial of European Axis war criminals would be established by any one of the four signatories except as provided for in the London Agreement and Charter annexed, in which event "the establishment, functions and procedure of each tribunal shall be identical, and shall be governed by this Charter" (Charter, Art. 5). It was agreed, among other things, that any such international tribunal would consist of four members, each with an alternate, appointed by each of the signatories (Charter, Art. 2); that the prosecution would be conducted by the several powers jointly (Charter, Art. 14); that review of the sentence would be by the powers acting jointly (Charter, Art. 29); that such trial be only of major war criminals "whose offenses have no particular geographical location" (Agreement, Art. 1); and that each nation be authorized to try before its own courts of competent jurisdiction other cases in which it had power to act (Agreement, Art. 6). U. S. Military Government Ordinance No. 7, pursuant to which Tribunal IV was created, asserts as the basis for its promulgation powers derived from Control Council Law No. 10 and the London Agreement. These documents on their face indicate that the American Zonal Commander was not vested with any professed power to singly establish an "International Tribunal" and it is nowhere averred or pretended that such power was derived from the constitution or laws of the United States (R. 20-49).

Second, because the tribunal denied to the petitioner due process of law and all rights usually afforded an accused in the conduct of a criminal trial. He was denied the right to counsel of his own choice, the right to compulsory process, the right of confrontation, the right to challenge the jurisdiction of the tribunal or the competency of its members, the right to question the adequacy of the charges and the right of appeal or legal review. Sworn statements and incompetent hearsay documents and affidavits were used as a substitute for evidence (R. 147-180). Defense testimony was withheld and suppressed. Defense witnesses were confined, coerced and intimidated.[4] Inflammatory statements by the prosecution accompanied its presentation of evidence, all of which was a complete denial of even a semblance of a fair and impartial trial.[5] Branding the tribunal which permitted and condoned such practice as "international" does not and cannot excuse or authorize such activity on the part of American citizens. The effect of such a trial, where every vestige of due process and constitutional safeguards are discarded and rejected, can bring only ill repute to the good name of the American judiciary which has always been a symbol of "justice under law".

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[4] Judge Burke, a member of a similarly constituted tribunal expressed disgust and displeasure with such practices but to no avail (R. 133-137).

[5] Judge C. F. Wennerstrum of the Iowa Supreme Court, who presided at another of the trials, said: "If I had known seven months ago what I know today I would never have come here. Obviously the victor in any war is not the best judge of the war crime guilt. Try as you will it is impossible to convey to the defense, their counsel, and their people that the court is trying to represent all mankind rather than the country which appointed its members. What I have said of the nationalist character of the tribunals, applies to the prosecution. The high ideals announced as the motives for creating these tribunals have not been evident. The prosecution has failed to maintain objectivity aloof from vindictiveness, aloof from personal ambitions for convictions. It has failed to strive to lay down precedents which might help the world to avoid future wars. The entire atmosphere here is unwholesome. * * * Lawyers, clerks, interpreters, and researchers were employed who became Americans only in

Third, because the acts and alleged offenses of which the petitioner was found guilty and is now held in confinement by the United States Military Authorities do not constitute offenses either against the laws of the United States or against the laws of nations. In fact no offense against the laws or sovereignty of the United States was alleged or proven and no interference with the person or property of American citizens was alleged or proven.

The several counts charged the petitioner and others with a violation of practically all the articles of the Hague and Geneva Conventions, the laws and customs of war and with a violation of "the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and Article II of Control Council Law No. 10" (R. 117-130).

The petitioner was convicted on three counts no one of which constitutes an offense against the laws of the United States or any other sovereignty, nor against the laws of nations. He was convicted on the first count of allegedly permitting Russian prisoners of war to work in a freight car factory which was owned by a subsidiary of a holding

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recent years, whose backgrounds were imbedded in Europe's hatreds and prejudices. * * * Most of the evidence in the trials was documentary selected from the large tonnage of captured records. The selection was made by the prosecution. The defense had access only to those documents which the prosecution considered material to the case. Our tribunal introduced a rule of procedure that when the prosecution introduced an excerpt from a document, the entire document should be made available to the defense for presentation as evidence. The prosecution protested vigorously. Gen. Taylor (Brig. Gen. Telford Taylor, chief of the prosecution) tried out of court to call a meeting of the presiding judges to rescind this order. It was not the attitude of any conscientious officer of the court seeking full justice. Also abhorrent to the American sense of justice is the prosecution's reliance upon self-criminating statements made by the defendants while prisoners for more than 2½ years, and repeated interrogation without presence of counsel. Two and one-half years of confinement is a form of duress in itself. The lack of appeal leaves me with a feeling that justice has been denied." (Chicago Tribune, Feb. 23, 1948.)

company of which he (Flick) was the managing director. It is not a violation of international law to employ prisoners of war in such occupation.[6] The representatives of the Geneva International Red Cross visited the factory and approved such employment. The legal authorities of the same organization opined that such employment was not a violation of international law. The Prisoner of War Division, Provost Marshal General's Office, United States Army, authorized the employment of German prisoners of war in the manufacture of automobile trucks although said automobile trucks "may eventually be put to military use" (39 Amer. J. of Int. Law, p. 211).

The second alleged offense of which petitioner was found guilty was predicated upon a finding that the same holding company of which petitioner was the active head, acting by direction of the German authorities, operated, through a subsidiary, a certain French plant known as "Rombach", located in Lorraine. Such act is not an offense either against the sovereignty of the United States or international law.[7]

According to the judgment of the tribunal, the Rombach plant was returned to its owners in better condition than it

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[6] Hague Regulation Article VI; Rules of Land Warfare, War Department Basic Field Manual, 27-10, par. 104; 39 American Journal of International Law, p. 211; Article 31, Geneva Prisoner of War Convention 1929; War Dept. T. M. 27-251, p. 81; Oppenheim, International Law, 6th Rev. Ed. by Lauterpacht, Vol. II, pp. 298-9; Hyde, International Law, 2nd Rev. Ed., Vol. III, pp. 1850-1; Spaight, War Rights on Land, p. 281.

[7] Articles 23(g) and 52 of the Hague Convention of 1907; Oppenheim, Int. Law, 6th Rev. Ed. by Lauterpacht, Vol. II, p. 451; Schwartzenberger, *International Law*, pp. 268-276; *Dow* v. *Johnson*, 100 U. S. 158, 168; *Pezdoref & Co.* v. *Germany*, 3 Mixed Arbitral Tribunal (1923) 22, 26; *Compagnie des Chemins de fer du Nord* v. *Germany*, 9 Mixed Arbitral Tribunal (1929) 27, 72-73. Under circumstances not necessary to here discuss, petitioner's operation of the Rombach plant may have given rise to a claim for damages. *Underhill* v. *Hernandez*, 168 U. S. 250; *Dow* v. *Johnson*, supra; *Ralli Bros.* v. *Germany*, 1 M. A. T. (1924), p. 22; *Ville d'Anvers* v. *Germany*, 5 M. A. T. (1926) 712.

was in when it was taken over. It found further that Flick received no profit or personal advantages from its operation (R. 79-81). It is difficult to understand of what Tribunal IV found petitioner guilty on this count, which was a charge of plunder and spoliation. The judgment indicates that there was no plunder and there was no spoliation.[8]

Hague Regulation 46, to which the Tribunal referred, must be read in conjunction with Articles 52 and 23(a), and when so read indicates that Flick's conduct did not constitute or *contribute to* a violation of the Hague Convention or the Rules of Land Warfare, technical or otherwise, and much less was it a crime. Today thousands of German plants in the several zones of occupation are controlled, operated and dominated by the respective occupation powers. In fact, the occupying forces in Germany, including ourselves, have decreed actual confiscation and for-

[8] The opinion reads in part: "Prior to the first World War when Lorraine was German, a large plant was built by German capital near the town of Rombach. After that war it was expropriated by France from whom the title was acquired by a French corporation dominated by the Laurant family. The enterprise consisted in 1940 principally of blast furnaces, Thomas works, rolling mills and cement works. * * * When the German army invaded Lorraine in 1940, the management fled but many of the workers, including technicians remained. Key installations had been removed or destroyed so that the plant was inoperable until extensive repair had been made. In the meanwhile the workers were idle except as they were employed to renovate the plant. After the occupation of western territories, the Supreme Commander of the German army issued a 'Decree concerning the orderly management and administration of enterprises and concerns in the occupied territories' dated 23 June 1940". It stated that public commissioners should be appointed, and so forth.

The Court went on to say that the appointed commissioners contracted with Flick to operate the plant, that Flick had hopes of ultimately acquiring the title, that Flick's administration had nothing to do with the expulsion of Mr. Laurant from Lorraine, and that under Flick's operation all the profits were invested in repairs, improvements and new installations. The Court continued:

"As the allied armies approached Rombach, the German military authorities gave orders to destroy the plants which were disobeyed by the officials of the trustee (Flick). When the French management returned, the plants were intact. * * * *The evidence satisfies*

feiture of German plants and property.[9] The legal division of Military Government made no attempt to reconcile the ruling in the Flick case with our own decrees except to say that Germany lost the war—but the loss of a war does not justify the imprisonment, on inadequate grounds, of the private citizens of a conquered territory by "judicial process" or otherwise (Hague Convention 1907, Art. 46).

The last offense allegedly committed by the petitioner was that he made contributions to an organization known as the Circle of Friends, which funds petitioner allegedly should have known were being siphoned off for governmental activities which were wrongful. If making such contributions constituted a wrong, it was defined to be such by military fiat long after the event. As a matter of law it is not an offense against either the sovereignty of

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us that the trustee left the properties in better condition than when they were taken over. * * * It was, no doubt, Goering's intention to exploit it to the fullest extent for the German war effort. We do not believe that this intent was shared by Flick. Certainly what was done by his company in the course of its management falls far short of such exploitation.

Flick was interested in extending his organization through the acquisition of additional steel plants. Lorraine was German territory before the first World War and many Germans felt that in its seizure Germany would be getting back merely what was already her own. In many respects during the occupation, Germany treated Lorraine as Reich territory. * * * *In all of this we find no exploitation* either for Flick's present personal advantage or to fulfill the aims of Goering. * * * *"* The tribunal then concludes "that Flick's acts and conduct *contributed* to a violation of Hague Regulation 46. * * * *"* "In dealing with property located outside his own state, he must be expected to ascertain and keep within the applicable law" (R. 77-83). (Italics supplied.)

The above is a summary of the *atrocities* this petitioner was found guilty of having committed under Count 2.

[9] Control Council Law No. 9; U. S. Military Government Laws Nos. 52, 55, 56 and 75; Gen. Order No. 2, pursuant to Military Government Law No. 52.

the United States or the laws of nations and may not be the basis for *ex post facto* criminal charges.[10]

It is on the basis of the above findings that the petitioner, *a private citizen,* was arrested in an area overrun by our armies, held in confinement two years and then sentenced to seven years imprisonment by an American tribunal which was created without authority in law.

Respondents assert that petitioner was sentenced by an "executive tribunal" created in "implementation of international executive agreements incorporating foreign policy" and therefore its judgment is not subject to review.[11]

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[10] *Schooner Exchange* v. *McFadden,* 7 Cranch. (U. S.) 116; *U. S.* v. *Hudson,* 7 Cranch. (U. S.) 31; *The Antelope,* 10 Wheat. (U. S.) 66; *Winthrop's Military Law and Precedents,* 1920 Reprint, p. 837; *Ex parte Quirin,* 317 U. S. 1; *Ex parte Yamashita,* 327 U. S. 1.

The dictates of the military power were binding upon the petitioner and from its rulings he was allowed no appeal. In two other Nuremberg cases, similar charges, alleging the making of a contribution to the Circle of Friends, *were held not to constitute an offense as a matter of law.*

[11] The respondents in the Court below, in urging that no review be allowed, said (Respondents' Brief, pp. 15-16): "The acts of executive tribunals in implementation of international executive agreements incorporating foreign policy have been held to be matters peculiarly within the competence of the executive and not subject to review by the courts. The fact that the personnel of the tribunal was exclusively American cannot alter the basic fact that its acts were in pursuance of foreign policy in accordance with international agreements."

Apparently entirely overlooked is the immutable principle that there must be no fusing of executive and judicial powers and that war does not suspend the constitution or any part of it. *Ex parte White,* 66 Fed. Supp. 982. The establishment of courts to function "as courts" is not to be confused with the President's exercise of political powers, discussed infra. See opinion, Mr. Justice Douglas, *Hirota* v. *MacArthur,* 93 S. Ct. (Law Ed.) 1450; *Jecker* v. *Montgomery,* 54 U. S. 498. On the theory advanced by the respondents the executive branch of the government may establish courts, civil or military, entirely outside the recognized judicial system and the Military Laws of the United States, to implement or enforce foreign policy and executive agreements. Serious constitutional questions are thus raised and the path is fraught with danger. President

No crimes and no atrocities or brutalities such as those ascribed and intended by the Moscow Declaration of October 30, 1943 and later governmental pronouncements on the subject were committed by this petitioner. His conviction upon the first two counts rests upon the finding that he, as a private business man, complied with directives of his Government aimed at aiding the German war potential. There was nothing violative of domestic or international law in so doing.[12] The petitioner is nevertheless restrained of his liberty by United States Military Authorities and is without redress unless this Court grants the relief herein sought.

Fourth, the imprisonment of petitioner is further illegal because the United States Military Authorities who hold him in custody are acting in violation of the constitu-

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Washington, in his farewell address to the nation on 17 September 1796 said: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism. * * * let there be no change by usurpation. * * * it is the customary weapon by which free governments are destroyed."

The executive department, unless there is a suspension of the writ, cannot withdraw from the courts the power and duty of inquiry by habeas corpus into the propriety and legality of detention. *In re Yamashita,* 327 U. S. 1. Aliens are entitled to the same redress. *Hennessy* v. *Richardson,* 189 U. S. 25; *United States* v. *Crook,* Fed. Case No. 14891; *Ochoa* v. *Hernandez,* 230 U. S. 139; *Ex parte Quirin,* 317 U. S. 1, 25. Powers exercised by the military, affecting rights of person or property of aliens or citizens, have always been subject to judicial review. *Sterling* v. *Constantin,* 287 U. S. 378; *Duncan* v. *Kahanamoku,* 327 U. S. 304; *Ex parte Yamashita,* 327 U. S. 1, 9; *O'Reilly* v. *Brooke,* 209 U. S. 45; *Ex parte Milligan,* 4 Wall. (U. S.) 2, 119; *Dynes* v. *Hoover,* 20 How. (U. S.) 65; *Mitchell* v. *Harmony,* 13 How. (U. S.) 115; *Humphrey* v. *Smith,* U. S. Sup. Ct. decided April 25, 1949; *Ex parte Quirin,* supra.

[12] *U. S.* v. *McIntosh,* 283 U. S. 605; *MacLeod* v. *U. S.,* 229 U. S. 416, 428; *Thorington* v. *Smith,* 75 U. S. 11; *Prize Cases,* 67 U. S. 635.

tion and laws of the United States; in violation of the laws and customs of war; and in violation of the laws of nations and international agreements to which the United States was a party, and the Military Authorities may not excuse, justify or exculpate such restraint of liberty on the asservation that they are acting for or on behalf of any other nation or group of nations, or jointly with them. Opinion, Mr. Justice Douglas, *Hirota* v. *MacArthur*, 93 S. Ct. (Law Ed.) 1450.

Fifth, because the United States which holds him in custody was without power to bring to trial, singly or in conjunction with others, a citizen of a foreign country for alleged offenses committed outside the United States which offenses were not violative of American sovereignty or the laws of war, and did not interfere with the person or property of American citizens,[13] and the United States Military Authorities may *not* restrain the liberty of any person except in due course of law and *may not act as "warden" for any other power, group of powers or mythical "international governmental authority" at whose behest it is asserted petitioner is being held.*[14]

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[13] *States* v. *Bowman*, 260 U. S. 94; *U. S.* v. *Archer*, 51 Fed. Supp. 708; *Underhill* v. *Hernandez*, 168 U. S. 250; *United States* v. *Arjona*, 120 U. S. 479; Ernest Fraenkel, Mil. Occupation and the Rule of Law, p. 49; 39 Amer. J. of Int. Law, 257, 270; Winthrop's Mil. Law and Precedents, 1920 Reprint, p. 838.

[14] The Control Council which the respondents and the Court below referred to as being "the supreme governing body of Germany" (R. 182, 184); the "new international government or condominium" (Govt.'s brief, Court below, p. 10); "the legitimate legislator of the * * * condominium [sic]" (Govt.'s brief, Court below, p. 11); "the high legislative branch of the four allied powers" (R. 50); etc., has for all practical purposes been non-existent since September, 1946, and former Secretary of State Byrnes so declared: Dept. of State, Pub. No. 2783, European Series 23, pp. 11, 69. See also Monthly Report of the Military Governor, U. S. Zone, No. 36, June, 1948, p. 1.

Reasons Relied Upon for Allowance of the Writ

1. Questions of importance and far-reaching consequences, as is pointed out in the petition and supporting brief, involving the interpretation and construction of Constitutional, Federal and International law are presented for determination.

2. Novel questions involving the power of the executive branch of the Government and the military authorities to imprison persons without due process under our law and at the same time absolve themselves from judicial scrutiny for such action, are presented which should be determined by this Court.

3. The questions posed by Mr. Justice Douglas in his concurring opinion in *Hirota* v. *MacArthur*, 93 S. Ct. (Law Ed.) 1450, which unquestionably are of a serious and grave nature, are squarely presented for determination.

4. The granting of this petition would vest jurisdiction in this Court to determine the many new, complex and vexing questions involving our occupation of European territory and the authority wielded by the military over alien and citizen alike—also the power of the United States District Courts to inquire into the legality of the powers so exercised. *Ahrens* v. *Clark*, 68 S. Ct. 1443; *Eisentrager* v. *Forrestal*, 174 F. 2d 961. Heretofore, for want of original jurisdiction, this Court did not pass on the merits of the large number of petitions for writs of habeas corpus filed in this court.[15]

5. Questions, which cannot be settled finally by any less authority than the ruling of this Honorable Court,

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[15] *Ex parte Betz et al.*, 329 U. S. 672; *Milch* v. *U. S.*, 332 U. S. 789; *In re Eichel, et al.*, 333 U. S. 865; *Brandt* v. *U. S.*, 333 U. S. 836; *Everett* v. *Truman*, 334 U. S. 824; *In re Bush*, 336 U. S. 971; *Bird* v. *Johnson*, 336 U. S. 950, and other cases.

involving the "judicial processes" employed by the Military Authorities overseas, and the much debated "war crimes punishment" practices employed by them, are presented for determination.

6. Errors were committed by the Court below, involving the application, interpretation and construction of domestic and international laws, which if permitted to go unchallenged will have an adverse effect on rights of persons—nationals and aliens everywhere. Such errors, involving substantial rights, should be reviewed and corrected by this Honorable Court. Among such errors are:

A. The lower Court's holding that the origin and source of the power of United States Military Tribunal IV arose out of the joint sovereignty of the governments of the United States, Great Britain, France and the Soviet Union through a delegation of power by each of these governments to the Control Council for Germany. Such holding is erroneous factually and legally. Such holding is contrary to the contents of many official documents relating to the creation of the Control Council, its powers and functions. It is also contrary to many official documents relating to the origin and creation of United States Military Tribunal IV and the law applicable thereto.

B. The lower Court's erroneous conclusion that United States Military Tribunal IV was an international court and that the United States Military Authorities were clothed with power to create a "judicial body" not authorized by the Constitution and laws of the United States. Here no treaty or executive agreement was entered into for that purpose such as was done in the case of the Tribunal which tried Goering, et al., in Europe and the Tribunal which tried Hirota, et al., in the Far East. In fact the creation of Tribunal IV, as an international Tribunal, flaunted an executive agreement of the United States *not* to create such courts.

C. The lower Court's erroneous application of domestic law, in its overruling the District Court on the sole issue decided by that Court and then sustaining the lower Court's dismissal of petitioner's petition for a writ of habeas corpus on a separate and distinct ground which was not before it, thereby denying to the petitioner the opportunity of presenting evidence on disputed questions of fact.

D. The lower Court's erroneous ruling that United States Military Tribunal IV was not a tribunal of the United States, and that, therefore, the District Court was "without power" to review its judgment and sentence. Reliance on *Hirota* v. *MacArthur,* supra, as a precedent for its decision was likewise error as the *Hirota* case has no application to the facts and circumstances here involved. In fact, in the *Hirota* case the government *specifically* refrained from discussing the legality of the judgment of a "wholly American Tribunal" established in an American occupation area, such as was Tribunal IV (Govt.'s Brief, Hirota, p. 87).

E. The lower Court's conclusions relating to the character, jurisdiction, powers and functions of Tribunal IV are erroneous on both the law and the facts.

Preliminary Argument in Support of Petition

The disquietude and concern expressed by Mr. Justice Douglas in his opinion in *Hirota* v. *MacArthur,* supra,[16]

[16] "The formula which it evolves," said Mr. Justice Douglas, "to dispose of the cases is indeed potentially dangerous. It leaves practically no room for judicial scrutiny of this new type of military tribunal which is evolving. It leaves the power of those tribunals absolute. Prisoners held under its mandates may have appeal to the conscience or mercy of an executive; but they apparently have no appeal to law. * * *"

"If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he

and by other members of this Court, including the late Mr. Justice Murphy, in several cases which have come before this Court,[17] are shared by many persons on all continents and were likewise shared by the men who sat in judgment of the petitioner. The opening statement of their opinion is as follows:

> "Facing this Tribunal are private citizens of a conquered state being tried for alleged international crimes. Their judges are citizens of one of the victor states selected by its War Department. There may well be misgivings as to the fairness of such a trial" (R. 56).

If, as Mr. Justice Douglas said in *Hirota* v. *MacArthur*, we should allow inquiry where an American jailer holds

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supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

"I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well."

[17] *Homma* v. *Styer*, 327 U. S. 759; *In re Yamashita*, 327 U. S. 1; *Duncan* v. *Kahanamoku*, 327 U. S. 304. "More is at stake," said Mr. Justice Rutledge in *In re Yamashita*, supra, at page 41, "than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the second inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than *due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents.* * * * At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guarantees, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law * * * *"

a prisoner in conjunction with others, it follows, *a fortiori*, that inquiry into detention by writ of habeas corpus should be permitted where, as in this case, the American jailers act alone. Unlike the *Hirota* case no international tribunal is here involved and regardless of the circuity of the reasoning advanced for a contrary holding, the fact remains that in the arrest, trial, conviction and imprisonment of petitioner, the United States acted alone and not in conjunction with other powers. Who are the other powers which the respondents assert joined in the prosecution of Flick? As is hereinafter pointed out, Russia did not participate; France did not participate, nor did Great Britain.

As late as July 6, 1949, the question of Great Britain's participation in this so-called "international tribunal" was raised in the House of Lords and it was there asserted in unequivocal terms that Great Britain had no responsibility whatsoever for this trial or the others similarly constituted and conducted.[18]

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[18] The Official Gazette for the House of Parliament contains the following:

> "The Lord Bishop of Chichester: My Lords, I beg to ask the Question which stands in my name on the Order Paper. (The Question was as follows:
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> "To ask His Majesty's Government whether the Government of the United Kingdom of Great Britain and Northern Ireland have had any responsibility for the proceedings for the trial of German war criminals at Nuremberg subsequent to the conclusion in October, 1946, of the International Military Tribunal for the trial of German major war criminals; and whether the statement contained in an article published by the New York Herald Tribune on May 23, 1949, that 'the Nuremberg trials were conducted by Great Britain and U. S. A.' is correct.)
>
> "The PARLIAMENTARY UNDERSECRETARY OF STATE FOR FOREIGN AFFAIRS (Lord Henderson): My Lords, His Majesty's Government have always approved of the policy that Germans alleged to have committed war crimes should be brought to trial. *His majesty's Government have, however, had no responsibility whatsoever for the trials which have been taking place at Nuremberg since the conclusion in October, 1946, of the International Military Tribunal* which tried the German major war criminals." Volume 163, No. 93, Parliamentary Debates (Hansard), House of Lords, Official Report, dated July 6, 1949.

Lord Henderson, the Undersecretary of State for Foreign Affairs, speaking for Great Britain, which nation the United States asserts joined with it in creating the military court which tried Flick, unequivocally denies such participation. There can be no question but that the so-called U. S. Military Tribunal IV which tried petitioner was exactly what its name says it was—a U. S. Tribunal, and since such Tribunal is not sanctioned or authorized by the laws of the United States or the laws and customs of war its findings and sentences are a nullity. Almost 100 years ago this Honorable Court in *Jecker, et al.* v. *Montgomery,* 54 U. S. 498, 515, said:

> "Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution and the laws of the United States; *and neither the President nor any military officer can establish a court in a conquered country and authorize it to administer the laws of nations.*" [19]

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[19] The same principles were recently reaffirmed in *In re Yamashita,* 327 U. S. 1, 9; *Ex parte Quirin,* 317 U. S. 1; *Duncan* v. *Kahanamoku,* 327 U. S. 304.

Mr. Justices Davis in *Ex parte Milligan,* 71 U. S. 2, at pages 119-121, stated: "The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. *If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. * * * The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.*"

Congress in the exercise of its constitutional prerogatives has declared that violators of the laws of war be tried before Military Commissions. Article of War 15; Manual for Courts Martial (1928), par. 2; *Ex parte Quirin,* supra, p. 28. The creation of such tribunals, its powers and functions are governed by law and if, as here, the accused was tried before a tribunal which did not measure up to the required standards either in its creation or in its procedure its judgment is a nullity. *In re Yamashita,* supra.

A very different situation exists here than that which was shown to exist in the *Hirota* case. There, acting upon instructions of the Far Eastern Commission, a tribunal composed of members of eleven nations sat in judgment of the accused. In that case the proceedings were brought in the name of the several governments jointly and prosecuted by them jointly. A similar situation existed in the international court, which sat in Europe and which tried Goering et al. The legality of that court and of its decrees is not here brought into question. *We do, however, here question the power of an American Military Commander to set up a court of his own making; staff it with persons of his own choosing; define crimes and prescribe procedure to his liking; and to conduct a criminal prosecution with absolute indifference to the Constitution and laws of the United States and the laws and customs of war.*

No person, whether acting in an executive, legislative or judicial capacity or as a Military Commander, can evade compliance with the Constitution and laws of the United States, nor can he immunize himself from judicial scrutiny of his conduct regardless of the excuse offered for such conduct.[20] The tenuous argument here offered by the Military that the Tribunal was international and therefore not subject to review by our courts is, as hereinafter demonstrated, not sustainable on the law or the facts.

It is submitted that there are issues of substance and of such importance that the intervention of this Court is warranted. Vast and seemingly unlimited power is being exercised by the military in the far flung areas of the earth in contravention of the Constitution and laws of this nation, and the laws of nations. This petition poses questions of

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[20] *Ableman* v. *Booth*, 21 How. (U. S.) 506; *Sterling, et al.* v. *Constantin, et al.*, 287 U. S. 378; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Raymond* v. *Thomas*, 91 U. S. 712. In the *Ochoa* case, supra, at p. 160, it was held that even if the commanding officer in territory occupied by the U. S. military forces has *all* the legislative power as to such territory, he is still subject, as is Congress, to constitutional limitations and cannot, by military orders, deprive persons of their liberty or property without due process of law.

far reaching importance. While today it involves the life and liberty of a German national, tomorrow it may involve the life and liberty of an American citizen. Such cases have already arisen, but this Court was denied the opportunity of passing on the issues because petitions and applications were filed in this Court which were denied for want of original jurisdiction (*Ex parte Betz, et al.*, 329 U. S. 672; *Bird* v. *Johnson*, 336 U. S. 950; *In re Bush*, 336 U. S. 971). Habeas corpus is the means of causing judicial inquiry in the reasons for restraint, whenever exercised by civil or military authorities (*Eagles* v. *Samuels*, 329 U. S. 304; *In re Yamashita*, supra), and such remedy was here invoked.

Prayer for the Writ

For the reasons hereinabove stated and those stated in the brief in support of this petition, it is respectfully prayed that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and send to this Court a complete transcript of record and all proceedings in the instant case so that the cause may be reviewed and determined by this Honorable Court and the judgment of the Court below reversed; and the petitioner respectfully prays that he be granted such other further and equitable relief as this Court may deem just and proper.

JOSEPH S. ROBINSON,
EARL J. CARROLL,
GEORGE T. DAVIS,
FRED W. SHIELDS,
JAMES D. GRAHAM, JR.,
DAYTON M. HARRINGTON,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

United States Military Tribunal IV which tried petitioner was not an International Court. It was created and established by the United States Military Authorities in contravention of law, treaties and international agreements. Its pronouncement of judgment and sentence is a nullity and petitioner's imprisonment is illegal. A writ of habeas corpus should accordingly issue.

[For a better understanding of the issues involved, both factual and legal, it is necessary to set forth in chronological order the sequence of events, beginning with the wartime declaration of the allied powers respecting the trial and punishment of so-called war criminals.]

A. The United States policy and early commitments respecting the trial and punishment of German war criminals.

On October 30, 1943, the United States, Great Britain and the Soviet Union issued what is now referred to as the Moscow Declaration, wherein it was decreed that German nationals responsible for atrocities, massacres and other brutalities would be brought to justice and punished. Similar pronouncements were made by the responsible heads of the allied governments both before and after the Moscow Declaration, but that document is important because it was issued jointly and is the basis for later agreement between the allied powers. It reads in part:

"At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished

according to the laws of these liberated countries and of the free governments which will be created therein. * * * Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done. * * * The above declaration is without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."

It is obvious from the above that the policy of the three allied governments, later crystallized by a four-power agreement, was to try the German ring leaders by a joint decision of the allies and to track down other persons guilty of atrocious crimes so that they may be tried by courts of competent jurisdiction appointed by the offended sovereigns.[21]

It was not within the contemplation of the parties that minor or technical violators of the laws of war be brought to trial before "international courts." Although it is here contended that the petitioner was not guilty of any offense under national or international law, at most his conviction rests upon alleged technical violations of the Hague Convention in the operation of his industrial organization (R. 56-102). No atrocities, massacres, or brutalities were ever committed by him, nor was he one of the German ringleaders responsible for World War II.[22]

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[21] Mr. Justice Jackson said: "The good faith of the United States is pledged in the Moscow declaration. I am willing to say that the agreement we made once, we reiterate, * * *." Dept. of State Pub. No. 3080, p. 221.

[22] His record, as pointed out in the Tribunal's judgment, was one of opposition to the Hitler gang which seized power in Germany in 1932. He backed Hindenberg for the presidency with large sums of money. The opinion of the Tribunal continues, "This doubtless was not forgotten. To Flick's knowledge his telephone conversations were subjected to wire tapping. He had other reasons to believe his position with party leaders, and particularly Himmler

To make the Moscow Declaration effective a United Nations War Crimes Commission was created, but it was not successful in reaching a governmental agreement as to the tribunals to try or the procedure to follow in judging the guilt of "war criminals." Accordingly, on January 22, 1945, the Secretary of State, the Secretary of War, and the Attorney General, recommended to President Roosevelt that an international military tribunal, composed of members selected by the several powers, be established by executive agreement for the trial of the German ringleaders guilty of atrocious crimes, as well as the organizations which aided them such as the SS, Gestapo, and so forth. "The above," these three Cabinet officers said, "would complete the mission of this international tribunal. Thereafter there would be brought *before occupation courts* the individuals not sent back for trial under the provisions of the Moscow Declaration. * * * *The subsequent trials would be had, as noted, in occupation courts; or in the national courts of the country concerned or in their own military courts;* or, if desired, by international military courts." (Italics supplied.) (Dept. of State Pub. 3080, pp. 7-8.)

The British Foreign Office indicated by Aide-Memoire that it was prepared to cooperate in establishing a *mixed* military tribunal for cases which for one reason or another

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was none too secure. * * * Both defendants joined the Nazi party, Steinbrinck earlier then Flick, but after the seizure of power. Membership in it also was to them a sort of insurance. They participated in no party activities and did not believe in its ideologies. They were not pronouncedly anti-Jewish. Each of them helped a number of Jewish friends to obtain funds with which to immigrate [*sic*]. They did not give up their church affiliations. * * * Defendants did not approve nor do they now condone the atrocities of the SS. * * * Flick knew in advance of the plot on Hitler's life in July 1944, and sheltered one of the conspirators * * * " etc. (R. 100-101).

In the light of the tribunal's findings it cannot be said that he was one of the German ringleaders who brought on World War II, or that he participated in such hideous wrongs as to castigate him a "major war criminal"—a term referred to in the Moscow Declaration and later agreements implementing same.

could not be tried in national courts civil or military (Dept. of State Pub. 3080, pp. 20, 22, 39-41).

In late April and early May, 1945, the matter was discussed at San Francisco and it was there agreed in principle by the four leading powers that an international military tribunal be created to try the major German war criminals and that the others, whose offenses had a fixed geographical location, be returned to the custody of the sovereign power of the area involved to stand trial before national courts (Dept. of State Pub. 3080, pp. 22, 39-41).

The American proposals submitted at San Francisco and which the other powers accepted in principle contemplated the creation of only *one* international tribunal with the possibility of its having to try more than one case, and contemplated further that any person not brought before the mixed international tribunal be tried by the established judicial processes, civil or military, of the sovereigns offended (Dept. of State Pub. 3080, p. 32). This theme or proposal was never deviated from as subsequent negotiations and agreements indicate. It was never contemplated or even proposed that each of the nations be empowered to appoint so-called "international" courts composed entirely of nationals of that nation, nor was it ever contemplated or proposed that any but the ringleaders be brought to trial before international courts, and then only by the joint decision of the allies in each particular case.

To give effect to the informal understanding between the governments, President Truman named Associate Justice Robert H. Jackson to act as the representative of the United States and to act as its chief counsel in the preparation and prosecution of charges before an international military tribunal (Executive Order No. 9547, R. 52).

Much of what happened thereafter leading to the signing of the London Agreement on August 8, 1945, is contained in Department of State Publication 3080 entitled "Inter-

national Conferences on Military Tribunals." The reported verbatim discussions between the representatives of the four powers make it abundantly clear that the contracting parties agreed to but one international court for the trial of the German war leaders and for the trial of such organizations as the SS, Gestapo, etc. *It was contracted, in the form of a limitation on the four signatory powers, that if other international courts for the trial of other German war criminals were to be established, such courts were to be created and composed exactly like the first one.* The one international court provided for, later came to be known as the I M T (R. 35).

The above stipulation was entered into by the United States on the highest governmental level and no military governor or officer was authorized or vested with power to create an international court of a different character or composition in derogation of our treaty obligation, regardless of the source of the asserted power.

B. The London Agreement and Charter of the International Military Tribunal.

The London Agreement, which was entered into after many weeks of consultation and delicate negotiations between the representatives of the United States, Great Britain, France and Russia, was most specific in its terms.[23]

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[23] "WHEREAS the Moscow Declaration of 30 October 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes *will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries* and of the free Governments that will be created therein;

"AND WHEREAS this declaration was stated to be *without prejudice to the case of major criminals whose offenses have no particular geographic location and who will be punished by the joint decision of the Governments of the Allies;*

"NOW THEREFORE * * * Art. 1. There shall be established after consultation with the Control Council for Germany an *International*

Only one international tribunal was contemplated for the trial of a limited group of persons with the proviso that should other international courts be deemed necessary they *must* be established in the same manner and be identical with the one agreed upon (R. 35). The judges must be appointed by each of the four signatories, etc. Persons not brought to trial before the international tribunal were to be returned and tried according to the laws of the offended

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Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

"Art. 6. *Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.*

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

"Art. 2. *The Tribunal shall consist of four members, each with an alternate.* One member and one alternate shall be appointed by each of the Signatories. * * *

"Art. 5. In case of need and depending on the number of the matters to be tried, *other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.*"

Art. 6 defined the offenses.

"Art. 14. *Each Signatory shall appoint a chief prosecutor* for the investigation of the charges against and the prosecution of major war criminals.

"The Chief Prosecution shall act as a committee for the following purposes:

(a) To agree upon a plan of the individual work of each of the Chief Prosecutors and his staff.

(b) *To settle the final designation of major war criminals* to be tried by the Tribunal. * * *

"Art. 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(a) investigation, * * *

(d) to act as prosecutor at the Trial. * * *

"Art. 26. The judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based, and shall be final and not subject to review" (R. 31-43). Italics supplied.

sovereign or they could be tried in the occupied zones before the occupants' legally recognized tribunals—in the case of the United States, before military commissions (Winthrop's Military Law and Precedents, 1920 Reprint, pp. 831-34; *Ex parte Quirin,* supra; *In re Yamashita,* supra). It cannot reasonably be argued that the London Agreement authorized the several military governors of Germany either individually or collectively to establish "international courts" composed entirely of members of the appointing nation and in disregard of the specific limitations contained in the London Agreement. Our own military governor, like all other Americans, is bound to respect treaty obligations since they are the law of the land (U. S. Constitution, Article VI, clause 2; *MacLeod* v. *U. S.,* 229 U. S. 416; *Hauenstein* v. *Lynham,* 100 U. S. 483; *Whitney* v. *Robertson,* 124 U. S. 190; *U. S.* v. *Schooner Peggy,* 1 Cranch. U. S. 103).

It was held below that the power of the American military governor to establish such court stems from authority vested in him by the Control Council for Germany of which he was a member. If that is so, why was it necessary for Mr. Justice Jackson and his staff to spend weeks and months of arduous work leading to an executive agreement, if the Control Council could have authorized the establishment of an "international court" without such agreement or in spite of it.

The representatives of the four nations, including Mr. Justice Jackson; the Attorney General of the United Kingdom, Sir David Maxwell Fyfe; the Lord Chancellor of the United Kingdom, Sir William Jowett; Judge Robert Falco of the French Cour de Cassation, and others, as their discussions reveal (Dept. of State Pub. 3080) *all agreed with the President of the United States, the Secretary of State, the Secretary of War, and the Attorney General of the United States that an executive agreement on the highest government level, or a treaty, was necessary to create an international tribunal and that neither joint nor single military decree would suffice* (Dept. of State Pub. 3080). Several world-renowned authorities on inter-

national law, including Mr. George A. Finch, Editor in Chief of the Am. J. of Int. Law and counsel for the Carnegie Endowment for Int. Peace, whose opinions we will submit to the Court in the event this petition is granted, are likewise of the opinion that neither the military governors nor the so-called Control Council composed of the four military governors could authorize the establishment of an "international court" and that in fact Tribunal IV was not an "international body."

Not only was the Control Council not authorized to establish international courts, but it was specifically denied such power, as the conferences and drafts of agreements reveal.[24]

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[24] The minutes of the four-power conference (Dept. of State Pub. 3080) indicate clearly that the participants intended to deny any right in the Control Council to set up international courts and that it was intended to have all cases other than those tried before the I M T tried before national or occupation courts. Sir David Maxwell Fyfe said, at p. 97, "While the Control Council must be consulted, the responsibility for the tribunals must rest with the governments concerned. *It is important to emphasize the independence of the Tribunal, and it would be a mistake to place it under the Control Council. It should be a government problem rather than a Control Council problem." All agreed,* and the American delegation submitted a new draft containing the following language defining the functions of the Control Council. It reads, p. 125: "The Signatories agree that the Control Council for Germany shall establish policies and procedures governing (a) the return of persons in Germany charged with criminal offenses to the scene of their crimes in accordance with the Moscow Declaration, and (b) the surrender of persons within Germany in the custody of any of the Signatories who are demanded for prosecution by any party to this Agreement." The functions and duties of the Control Council were thus limited.

In his memorandum dated 30 June 1945, Mr. Justice Jackson made it clear that but one international court would be established and that "*our* occupation courts will of course handle appropriate individual cases." (p. 127, Dept. of State Pub. 3080). In so far as the Control Council is concerned, Mr. Justice Jackson said, "we have provided that the Control Council shall establish policies and procedures [respecting return of prisoners] and that is what we think should be done—that we should not undertake to set up in our agreement policies and procedures about this, that these questions should go to the Control Council * * *" (p. 147).

The conferences indicated that the parties intended to limit the trial of so-called major war criminals to the international court

The respondents argue, in effect, that the military governors of Germany were supreme, that they could do anything they liked, whether in accord or contrary to an express agreement entered into by the four chiefs of state, including the President of the United States, in so far as creating courts was concerned. It was urged that each of the military governors, by agreeing with each other at a Control Council meeting, obtained power to appoint any kind of court they

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established by the London Agreement with the right in each country to employ national or occupation courts for the trial of the lesser cases (pp. 75, 111, 146). *Mr. Justice Jackson said in unequivocal terms* (p. 75) *that the American draft "is simply designed to make clear that each country retains the right to set up its own tribunal for any accused that are not reached by this (meaning the I M T)."* By "it own tribunal" Mr. Justice Jackson had reference to occupation courts which, in the case of the United States, are known as the Military Commission (p. 127).

General Nikitchenko used the expression "national tribunals" (p. 146). He said, "The right of national tribunals to try prisoners in their custody has not been infringed upon." Professor Trainin used the term "occupation court" when referring to the legally recognized military tribunal which normally functions in an occupied territory (p. 146). The other representatives used one or the other of the expressions interchangeably. The discussions indicate that the delegates understood those terms to mean courts of competent jurisdiction authorized and recognized by the laws of the respective sovereignties. General Nikitchenko said, "It is not our task to define the functions of either national or occupational courts. According to the national laws of the various countries, the basis on which criminal responsibility is established differs * * *" (p. 135).

There was much discussion between the delegates respecting the disposition of cases other than those to be tried before the I M T, and it was clearly understood that they would "be handed over to the appropriate national authorities for trial by them" (pp. 71, 75, 146). Following such understanding, provision was made limiting the functions of the Control Council to establishing policies and procedures for the return of prisoners in accordance with the Moscow Declaration (p. 184). No other powers were afforded the Control Council except to order sentences of the I M T executed or reduce their severity (p. 428). The agreement as finally drafted provided that those not tried before the international court be returned to the countries where they committed their offenses (Article IV); that no international war crimes courts other than those provided for in the London Agreement would be set up by any of the signatories (Charter, Article V); and that the signatories reserved the right to try war crimes cases before their "national" or "occupation" courts (Charter, Article VI, pp. 420-423, Dept. of State Pub. 3080).

chose and vest it with attributes of a mixed international body, regardless of the commitments made by their respective governments to the contrary. This is a strange doctrine, practically flouting civil authority and is not legally sustainable. (*MacLeod* v. *U. S.*, supra; *Ochoa* v. *Hernandez*, supra; *Jecker* v. *Montgomery*, supra; *In re Yamashita*, supra; *Dooley* v. *U. S.*, 182 U. S. 222.)

The London Agreement specifically limited the power of any of the four nations to create international courts of their own choosing. This is demonstrated, not only by the text of the agreement itself, but by the discussions preceding the signing of the agreement (Dept. of State Pub. 3080). No official of the U. S., whether he be military or civil, may violate the treaty obligations of this country. Our treaties and executive agreements are, along with our constitution, the supreme law of the land which all are duty bound to obey. (*Hijo* v. *U. S.*, 194 U. S. 315, and other citations above.)

C. The United States foreign policy *not* to engage in other "international war crimes trials" in Europe upon the conclusion of the one provided for in the London Agreement.

At the conclusion of the I M T trial, the U. S. government took the firm position that it would not engage in any more *international* trials for the trial of Axis war criminals (Dept. of State Pub. 3080, pp. 435-6).

Mr. Justice Jackson, the U. S. representative, in his report to the President on October 7, 1946, and almost a year after Control Council Law No. 10 was passed, said: "There is neither moral nor legal obligation on the United States to undertake another trial of this character. While the International Agreement makes provision for a second trial, minutes of the negotiations will show that I was at all times candid to the point of being blunt in telling the conference that the United States would expect one trial of the top criminals to suffice to document the war and to establish the principles for which we contended, and that we would make no commitment to engage in another.

"It has been suggested by some of our Allies that another international trial of industrialists be held. The United

States proposed to try in the first trial not only Alfried Krupp, but several other industrialists and cartel officials. Our proposal was defeated by the unanimous vote of our three Allies. After indictment, when it appeared that the elder Krupp was too ill to be tried the United States immediately moved that Alfried Krupp be added as a defendant * * * This was likewise defeated by the combined vote of all of our Allies * * * if they were unwilling to take the additional time necessary to try industrialists in this case, it does not create an obligation on the United States to assume the burdens of a second international trial."

"The quickest and most satisfactory results will be obtained, in my opinion, from *immediate commencement of our own cases* according to plans which General Taylor has worked out in the event that such is your decision.[25] Of

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[25] Brig. Gen. Telford Taylor was designated *Chief Prosecutor for War Crimes for the U. S. Military Government* and for any international military tribunal which may have *been established under the London Agreement* (R. 55). He was not designated as prosecutor for international courts established pursuant to Control Council Law No. 10 for the obvious reason that no one believed or asserted, at that time, that any international courts could be set up pursuant to Control Council decree and in derogation of the London Agreement. It was the London Agreement alone which authorized the establishment of an international court for the trial of Axis war criminals.

Mr. Justice Jackson in his report to the President said: *"Under your executive order of January 16, 1946, the war crimes functions devolve upon Military Government upon my retirement.* At the time this order was signed it was agreed between Military Government and myself that I would at once name Brig. Gen. Telford Taylor as deputy in charge of preparing subsequent proceedings, *and that upon my retirement he would be named to take over the war crimes prosecution on behalf of Military Government"* (Dept. of State Pub. 3080, p. 435).

General Order No. 301 dated 24 October 1945, issued by General McNarney reads: "Effective this date, Brigadier General Telford Taylor, USA, is announced as Chief of Counsel for War Crimes, in which capacity he will also serve as Chief Prosecutor for the United States under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945." It is obvious from the above that the President's decree and the military order issued in pursuance thereof, authorized the prosecutor to act on behalf of the U. S. Military Government *alone* with the proviso that he may also act under the Charter of the London Agreement. He was not authorized to prosecute before "international courts" now alleged to have been established by Control Council proclamation.

course, appropriate notification should be given to the nations associated with us in the first trial." The recommendation, according to State Dept. Pub. 3080, p. 436, was carried into effect by informal notification to other signatories on or about January 22, 1947, indicating that it was the President's decision and that we were to go ahead as planned with *"our own cases"*.

In another part of his report, Mr. Justice Jackson when referring to the trials which were to be conducted by General Taylor, said: "The most expeditious method of trial and the one that will cost the United States the least in money and in manpower is that each of the occupying powers assume responsibility for the trial within its own zone of the prisoners in its own custody. Most of these defendants can be charged with single and specific crimes which will not involve a repetition of the whole history of the Nazi conspiracy. The trials can be conducted in two languages [English and German] instead of four, and since all the judges in any one trial would be of a single legal system no time would be lost adjusting different systems of procedure" (Document LXIII, Dept. of State Pub. 3080, pp. 432-440).

It is obvious from the above that it was contemplated that our own military commissions or occupation courts, as authorized by the laws of the United States, would be employed for the trial of the lesser war criminals, who, for one reason or another, were not returned to the place where the alleged offense was committed, as directed in the Moscow Declaration.[26] Hundreds of war crime prosecutions

[26] Every trial involves the exercise of judicial power. From what source did Tribunal IV obtain its authority? Certainly no part of the judicial power of this country was conferred upon it, because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish". It was not created nor did it function as a military commission, for which provision is made in the Articles of War. It cannot justify under the London Agreement for it was

against German and Japanese nationals were conducted before our legally recognized military commissions. Some of those cases have come before this Court on petition for a writ of habeas corpus. *In re Yamashita,* supra; *Homma* v. *Styer, supra; Everett* v. *Truman,* 334 U. S. 824, and many others. Why the prosecutions against the industrialists were

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created in direct contradiction to it. The Control Council could not give it life because it lacked power to do so, and in any event *did not* do so. See subdivision D, infra. It cannot justify on the mandate of the President first, because he directed otherwise, and secondly, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make the laws, nor judicially interpret them, and "there is no unwritten criminal code to which resort can be had as a source of jurisdiction." *Ex parte Milligan,* 71 U. S. 2, 121; *Jecker, et al.* v. *Montgomery,* 54 U. S. 498, 515.

"Congress and the President, like the courts, possess no power not derived from the Constitution." (*Ex parte Quirin,* supra, p. 25.)

Congress *has* exercised its authority to define and punish offenses against the law of nations by providing for trial by military commissions. The enactment of Article of War 15, and Manual for Courts-Martial, 1928, Chapter One, Sections 1 and 2, sanctioned the creation of commissions by military command in conformity to long established American precedents. *Ex parte Quirin,* supra, p. 28; *In re Yamashita,* supra, p. 10; 10 U. S. C., Sec. 1486 (Art. of War 15).

Article of War 15 reads:

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts or other military tribunals."

The Manual for Courts-Martial, 1928, paragraphs 1 and 2, reads in part:

"1. MILITARY JURISDICTION—*Sources.*—The sources of military jurisdiction include the Constitution and international law. * * *

"2. MILITARY JURISDICTION—*Exercise.* * * *

"The agencies through which military jurisdiction is exercised include:

"*Military Commissions and Provost Courts* for the trial of offenses within their respective jurisdictions. These tribunals are summary in their nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial."

brought before a court such as the one here under attack can only be surmised.[27]

The President, as indicated above, desired that the cases remaining after the I M T Trial be conducted before U. S. Military Tribunals, organized in conformity with law and he issued orders accordingly. He was opposed to the exercise of political power in the cases of lesser offenders, *assuming arguendo* that he could have taken political action against the *private citizens* of an enemy state in disregard of the Hague Conventions. The Attorney General's office and the Judge Advocate General's office have taken the position that, in such matters, the President is supreme and that he determines the policy of the U. S., whether for good or bad (Govt.'s Brief; *Hirota* v. *MacArthur,* pp. 81-98). Mr. Justice Douglas is inclined to the same view (*Hirota* v. *MacArthur,* supra). Unquestionably political action by the Chief Executive, unless it violates the Constitution or some rule of law, binds the nation. It was this nation's foreign policy therefore, to conduct the remaining war crimes trials in Europe before U. S. Military Courts, and to avoid the use of international tribunals.

The President's decision was not without good reason, for as Mr. Justice Jackson pointed out, an international tribunal is not necessary for the trial of cases involving "the violation of the laws, rules and customs of war" (Dept. of State Pub. 3080, p. 380), and, in so far as trying offenses which were not violative of laws of war, such as

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[27] The law grants review in cases tried before military commissions. There was none allowed here. There are certain jurisdictional requirements in cases tried before military commissions. There were none here. There are certain standards of procedure and certain yardsticks for measuring the validity of the charges in our regularly constituted military tribunals (*Ex parte Quirin,* supra; *In re Yamashita,* supra). There were none here. Punishments are likewise limited, i.e., property may not be confiscated. There were no such limitations here. Several of the industrialists had property which the prosecution asked be forfeited. Our duly constituted tribunals obviously could not have served the desired purpose. Habeas corpus may be brought to test the legality and validity of the entire proceeding before a military commission. *In re Yamashita,* supra. That is sought to be denied here.

membership in criminal organizations, he observed that they too may be tried "before regular military tribunals" (State Dept. Pub. 3080, p. 48). The tribunal under attack was not proposed by Mr. Justice Jackson, and as far as we know, it was decreed without his knowledge or consent. His participation in the Nurenberg trials ended with the conclusion of the IMT trial (State Dept. Pub. 3080, pp. 212, 220, 236).

D. The Control Council could not and did not authorize the zonal commanders to create international courts for the trial of war criminals.

The Control Council is merely an association of military commanders, each of whom is supreme within his own zone of occupation, "for the coordination of policy in all zones and the determination of policy on matters affecting Germany as a whole * * *" (Dept. of State Pub. 2783, European Series 23, p. 8).

"In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Governments, by the Soviet, British, United States and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council" (Dept. of State Pub. 2783, European Series 23, p. 81).

The powers vested in the commanding general of the United States forces in occupied Germany within the framework of such military occupation and his functions within the Control Council are defined in Directive of the Joint Chiefs of Staff No. 1067, released on October 17, 1945. The pertinent provisions are contained in the footnote below.[28] Between the time of the surrender and the

[28] "This Directive is issued to you as Commanding General of the United States forces of occupation in Germany. As such you will serve as United States member of the Control Council and will also be responsible for the administration of military government in the zone or zones assigned to the United States for purposes of occupation and administration. It outlines the basic policies which

practical dissolution of the Control Council prior to September, 1946 (Dept. of State Pub. 2783, European Series 23, pp. 11, 69, 168) a number of declarations were made and directives issued which conflicted with or superseded earlier ones. These various conflicting or superseded documents have led to considerable confusion and misunderstanding as to the exact character and purpose of the Control Council. It is not a body exercising "the joint sovereignty of

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will guide you in those two capacities *after the termination of the combined command of the Supreme Commander, Allied Expeditionary Force.*" (The combined command terminated in June, 1945.)

"This directive sets forth policies relating to Germany in the initial post-defeat period. As such it is not intended to be an ultimate statement of policies of this Government concerning the treatment of Germany in the post-war world. * * * Supplementary directives will be issued to you by the Joint Chiefs of Staff as may be required.

"1. As a member of the Control Council *you will urge the adoption by the other occupying powers of the principles and policies set forth in this Directive and, pending Control Council agreement, you will follow them in your Zone.* * * *

"b) Subject to the provisions of Paragraph 3 below, *you are, by virtue of your position, clothed with supreme legislative, executive and judicial authority in the areas occupied by Forces under your command.* This authority will be broadly construed and includes authority to take all measures deemed by you necessary, appropriate or desirable in relation to military exigencies and the objectives of a firm Military Government. * * *

"3. a) The four Commanders-in-Chief, acting jointly, will constitute the Control Council in Germany which will be the supreme organ of control over Germany in accordance with the agreement on Control Machinery in Germany. *For purposes of administration of Military Government, Germany has been divided into four zones of occupation.*

"b) *The authority of the Control Council to formulate policy and the procedures and administrative relationships with respect to matters affecting Germany as a whole will be paramount throughout Germany. You will carry out and support in your zone the policies agreed upon in the Control Council. In the absence of such agreed policies you will act in accordance with this and other directives of the Joint Chiefs of Staff.* * * *

"d) * * * In the absence of a conflicting policy of the Control Council, you may deal directly with one or more zone commanders on matters of special concern to such zones. * * *" (Dept. of State Pub. 2423, pp. 40-59). Italics supplied.

the Four Victorious Powers" nor is it "the Supreme Governing body of Germany exercising its authority in behalf of the Four Allied Powers" as the Court below concluded, nor is it a body in which the sovereignty of Germany became vested.[29]

On February 11, 1945, the three major allied powers, following their Crimea conference, declared that they had agreed upon a plan for the occupation of Germany; that separate zones, each to be governed by one of the several powers (France to be included), were to be created and

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[29] Military occupancy does not transfer sovereignty. *Downes* v. *Bidwell*, 182 U. S. 244; *Fleming* v. *Page*, 9 How. (U. S.) 603. To this general proposition all writers on international law agree. "Sovereignty is a term used to express the supreme political authority of an *independent* state or nation." 48 Corpus Juris Secundum, Sec. 10; *Salinoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220; *Second Russian Ins. Co.* v. *Miller*, 297 Fed. 404, affirmed 268 U. S. 552.

The occupation of Germany being belligerent, the sovereignty, although temporarily suspended, remains in the conquered nation. *Shanks* v. *Dupont*, 3 Pet. (U. S.) 242. The inhabitants owe allegiance to the occupant but their private rights remain unchanged. *Sanchez* v. *U. S.*, 216 U. S. 167. The military government of the occupant is a mere extension of the force. *MacLeod* v. *U. S.*, 229 U. S. 416. The powers exercised by the military governor, however, are not without limitation—the limitations being those recognized by the laws, customs and usages of war and agreements made relating thereto, such as Hague and Geneva Conventions. *Dooley* v. *U. S.*, 182 U. S. 222; *Gates* v. *Goodloe*, 101 U. S. 612; *U. S.* v. *Dickelman*, 92 U. S. 520; *Harrison* v. *Myer*, 92 U. S. 111; *Mechanics etc. Bank* v. *Union Bank*, 22 Wall. (U. S.) 276; *The Grapeshot*, 9 Wall. (U. S.) 129; *Cross* v. *Harrison*, 16 How. (U. S.) 164; *Mitchell* v. *Harmony*, 13 How. 115; *Ochoa* v. *Hernandez*, 230 U. S. 139; *Raymond* v. *Thomas*, 91 U. S. 712; *Jecker, et al.* v. *Montgomery*, supra.

The Commanding General of a conquered territory is bound to respect and obey the agreements and declarations made by the President concerning the occupation (*MacLeod* v. *U. S.*, 229 U. S. 416), in this case the London Agreement, the Moscow Declaration and other pronouncements on the subject of war crimes prosecutions. Our generals are also duty bound to adhere to the rules of international law and the fundamental principles of this democracy "known wherever the American flag flies". *Ochoa* v. *Hernandez*, 230 U. S. 139, 164-5. "If", said Mr. Justice Douglas in *Hirota* v. *MacArthur*, supra, "an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag."

that a Central Control Commission would be established for "coordinated administration".[30]

On March 1, 1945, President Roosevelt stated that the administration of each of the four zones would be coordinated by a Control Council (Dept. of State Pub. 2423, p. 9): "We did, however, make it clear at this conference just what unconditional surrender does mean for Germany." • • • "It means the temporary control of Germany by Great Britain, Russia, France, and the United States. Each of these nations will occupy and control a separate zone of Germany—and the administration of the four zones will be *coordinated* in Berlin by a control council composed of representatives of the four nations."

On May 8, 1945, Germany surrendered unconditionally and on May 11th the Secretary of War announced that General Eisenhower will govern the American zone and be the U. S. representative on the Control Council (Dept. of State Pub. 2423, p. 60). Ours was an original occupation which carried with it certain rights and duties. Nothing was derived from the Control Council. Our rights, powers and duties stemmed from our conquest of the area (Rules of Land Warfare, F. M. 27-10, Sec. 6).

On June 5, 1945, the military governors of the four zones declared that they were assuming supreme authority *with respect to* Germany not the supreme authority *of* Germany, and that it will be exercised on instructions from their respective governments by each in his own zone of occupa-

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[30] Dept. of State Pub. 2423, p. 7: "Under the agreed plan, the forces of the three powers will each occupy a separate zone of Germany. Coordinated administration and control has been provided for under the plan through a central control commission consisting of the Supreme Commanders of the three powers with headquarters in Berlin. It has been agreed that France should be invited by the three powers, if she should so desire, to take over a zone of occupation, and to participate as a fourth member of the control commission."

tion.[31] Amplifying the declaration of the several zonal commanders was the Joint Chiefs of Staff Directive No. 1067, quoted hereinabove, wherein it was directed that the zonal commanders were supreme in their own zone and the Control Council function was to coordinate "policy and procedures" between the several zones (Dept. of State Pub. 2783, European Series 23, p. 82). No treaty or executive agreement was entered into surrendering to the Control Council any of our rights as a belligerent occupant nor was any of the sovereignty of the U. S. transferred to it.

It appears from the foregoing that no legislative, judicial or executive powers became vested in the Control Council, and that no powers not granted our zonal commander by this Government could be derived from it. The powers of the zonal commanders *did not stem* from the Control Council and the zone commanders *were not subject* to the Control Council. That body had no powers of its own. No instructions could be issued by it even to compel a meeting of the four military governors. Wherein then was it the supreme governing body over Germany? The Control Council was not vested with any part of the sovereignty of the United States and under international law neither our commander, nor the several commanders jointly, were vested with any part of the sovereignty of Germany.[32]

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[31] Dept. of State Pub. 2423, pp. 63, 68: "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany."

[32] "Belligerent occupation being 'essentially provisional', does not serve to transfer sovereignty over the territory controlled. * * * There has developed, accordingly, a body of law indicating the

The U. S. Joint Chiefs of Staff, on July 11, 1947, directed General Clay to take action consistent with international agreements and to promote self government in Germany, assuring them (the Federated Laender or States) of legislative, judicial and executive power (Dept. of State Pub. 2913, E. Ser. 27). If, as has been argued, the sovereignty of Germany and the supreme governing power was in the Control Council, how then could General Clay comply with orders from his Government without prior approval of the Control Council? The fact is that the Control Council never exercised any of the German sovereignty nor was it the supreme governing body of Germany, as the Court below erroneously concluded.[33] It was, during the short

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scope of the rights of the occupant over hostile territory and limiting his freedom of action.

"* * * 'a belligerent occupant * * * is to be regarded as a temporary possessor of what he controls rather than as a conqueror bent on the acquisition of the occupied area" (Hyde, *International Law*, 2 Revised Ed., Vol. 3, Sec. 688). "* * * although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, * * * *he is not the sovereign of the territory*" (Oppenheim, *International Law* by Lauterpacht, Fourth Ed., Vol. II, Sec. 169).

[33] The transfer of German sovereignty to the Control Council by reason of the unconditional surrender of Germany, as claimed by respondents, would amount to subjugation and the termination of the state of war between Germany and the Allied Governments. *Phillipson, Termination of War* (1916), pp. 8-51; *Hyde, International Law*, Second Revised Edition, Vol. 1, Sec. 107; Vol. III, Sec. 907; Oppenheim's, *International Law by Lauterpacht*, Sixth Edition, Vol. 2, Sec. 264; Wheaton's, *International Law* (7th Ed.), Keith, Vol. II, p. 615; Wilson, Handbook of International Law (3rd Edition—Hornbook Series), pp. 442-7; Halleck, *International Law* (4th Edition), 11, Chaps. 33 and 34, pp. 465-70; Vattel, The Law of Nations, Vol. III, Secs. 199-203; Hall, *a Treatise on Int. Law*, 5th Ed., Chap. 4; Lawrence, *The Principles of Int. Law*, Sec. 77; Phillimore, *Commentaries upon Int. Law*, Vol. III, Sec. 512.

As late as February, 1948, the U. S. Supreme Court held that the war was not terminated and that a state of war does, in fact, exist between the Governments of the United States and Germany. (*Woods v. Miller*, 333 U. S. 138.) A state of war of course presupposes the continued existence of opposing sovereignties. (*Hyde, International Law*, 2 Revised Ed., Vol. 3, Sec. 597.)

period of its existence, merely a coordinating or policy-making body—which it was intended to be from the time it was first discussed at Yalta and the parties by their actions so indicated.[34]

The fact that the Control Council is composed of the military commanders of the four occupying powers vests in it no greater authority in the aggregate than the sum

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[34] On 2 December 1946, the United States and Great Britain signed an agreement to fuse their respective zones in certain financial and economic matters and establish a joint export-import agency (JEIA) to handle matters relative to Germany's foreign trade. The Control Council was not consulted. Certainly matters relating to Germany's foreign trade affected *Germany as a whole,* but, as former Secretary of State Byrne has said, for all practical purposes, the Control Council was extinct.

On June 1, 1948, the international authority for control of the Ruhr was established. The Ruhr industries vitally affect *Germany as a whole.* The Control Council was not consulted. See Dept. of State Bulletins, June 20, 1948, Vol. 18, p. 809, and April 4, 1948, Vol. 18, p. 457.

On 20 June 1948, the currency .eform program, which led to the Russian blockade of Berlin, was put into effect—each of the three zonal commanders simultaneously issuing their own decrees. Currency reform certainly affects *Germany as a whole.* The Control Council was not consulted.

In 1948 Great Britain unilaterally announced that "war criminals" would not be returned as required by alleged supreme "quadripartite legislation" (Control Council Law No. 10) and that certain alleged "war crime offenses" would be tried in German courts. (Parliamentary Debates, House of Lords, official report by Hansard, Vol. 162, No. 68.) If the supreme authority was in the Control Council, the independent action thus taken, which was in defiance thereof, would be null and void. It was taken nevertheless and the Control Council was not consulted.

On 10 November 1948, the United States and British authorities issued decrees (U. S. Mil. Govt. Ord. 75) providing for the reorganization of the German coal, iron and steel industries—a measure vitally affecting *Germany as a whole.* France and Russia had no say in the matter and the Control Council was not consulted.

In early 1949, the three powers issued the new occupation decrees establishing a so-called high commission. If, as is contended, the supreme governing authority for *Germany as a whole* was in the Control Council, it would have been impossible to issue such decrees. The fact is that as early as 1946 the occupants recognized that the policy coordinating body called the Control Council was non-existent and that the prerogatives, if any it once had, were extinguished.

total of the individual authority of the respective military commanders and their individual authority is unquestionably limited.[35] Nevertheless, it is this Control Council which respondents assert is the supreme legislative body not only for all Germany, but in fact for all the world, for as is contended, it has taken upon itself the right to enact international law and define and punish international crimes.

In so far as the United States is concerned, Congress alone has the power *to define and punish* offenses against the laws of nations (U. S. Const., Art. 1, Sec. 8, Cl. 10), and Congress has never authorized, ratified or confirmed any of the acts of the Control Council.

If, pending action by Congress, the President is authorized to act, the position of the respondents is nevertheless untenable, because here the President, along with the other occupying powers, *acted to limit the creation of*

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[35] For example: Under our law, American soldiers are subject to trial before courts martial for offenses prescribed by the Articles of War. Such law is binding upon the military governor and he may not by order issued in the form of a Control Council decree direct that the soldiers of *all* the occupying powers may or shall be tried before a Control Council court for certain prescribed offenses. So, also, he may not violate the rules of international law by agreeing with the other occupying powers in the Control Council to seize the private property of the inhabitants of conquered Germany with or without a trial. Surely redress would not be denied to the American soldier on the theory that the Tribunal which tried him was "international" or that the zonal commander acted in his capacity as a member of the Control Council and not in his capacity as American military governor. Nor would redress be denied the inhabitant whose property was wrongfully taken by our military commander pursuant to alleged Control Council authority. So also, the petitioner here may not be deprived of a right of redress if there has been wrongful interference with his person or property, regardless of asserted "international authority" for such action. It will thus be noted that there are many limitations upon the power of the military governor and assertion that he acted in pursuance of foreign policy, or with other military governors jointly, cannot immunize him from judicial accountability for his actions. See *Raymond* v. *Thomas*, 91 U. S. 712; *MacLeod* v. *U. S.*, 229 U. S. 416, and other authorities heretofore cited.

an international court to the kind provided for in the London Agreement and to limit the functions of the international court to the trial of a limited class of war offenses. The President never delegated any power *to define and punish offenses against the laws of nations* to the heads of the military establishment or to the Control Council. Nor could he do so even if he wished to. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. Whatever the process of reasoning employed, the end result is that a power expressly conferred upon Congress by the Constitution was actually exercised by a body of four men, three-fourths of whom are foreigners. Such exercise of power expressly reserved for the Congress may not be given legal sanctity by our courts (*Panama Refining Co.* v. *Ryan,* supra).

As is demonstrated above, the Control Council is not in fact a legislative body. As a matter of law it could not be.[36]

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[36] There is no international legislature. All international law is by agreement either expressed or implied or derived from custom and usage, and the orders of an occupying power, whether issued jointly or severally, are not laws. Hackworth, *Digest of International Law,* Vol. 6, p. 393, et seq.; Hall's, *International Law,* 4th Ed., Sec. 155; Taylor, *International Law,* Secs. 576-8; *Ho Tung & Co.* v. *United States,* 42, Court of Claims 213, 227, 228; Article 43, Annex Hague Convention 1907.

The Control Council requires the unanimous consent of each of the four Military Commanders to give effect to its coordinated policy decisions. This is the Unanimity Rule of international treaty making, as opposed to the majority rule of a legislative body. Schwarzenberger, *International Law,* pp. 341, 342, 474; Permanent Court of Int. Justice, Series B (Mosul Case, Article 3 of Treaty of Lausanne), p. 30; Reports to the Hague Conference of 1899-1907, edited by James B. Scott for the Carnegie Endowment for International Peace, p. 19 of the Introduction; Hudson, World Court Reports, Vol. I, pp. 720, 740-3.

"It must further be assumed that if, in a convention, States have created an international institution for the exercise of their treaty rights, they have for such purposes established the exclusive competence of the institution, and that they have renounced any claim individually to take action regarding matters within the institution's jurisdiction." (Schwarzenberger, International Law, Vol. 1, p. 345.)

On July 11, 1947, General Clay was directed by the joint chiefs of staff—after approval by the State, War and Navy Departments—"to take action *consistent with relevant international agreements, general foreign policies of this Government and with this directive* • • • " (Dept. of State Pub. 2913, E. Ser. 2721, p. 1). He could not pursuant to this directive, if for no other reason, discard the London Agreement which specifically limited the type of international court to which the United States could be a party. Nor could he discard the foreign policy of the United States, embodied in the Moscow Declaration and other pronouncements, that war crimes be punished by the nations offended; that major war crimes be tried by joint decision of allies, and that we employ our own courts only for the trial of persons not returned to the locale of their offense. By wearing the robe of a Control Council member he could not agree to disregard treaty agreements or the foreign policy of the United States, nor could he become vested with power to create "international courts" in violation thereof.

The present occupation of the German state is a belligerent occupation (R. 143) and the occupants are bound by the laws and customs of war recognized by all civilized nations (Rules of Land Warfare, F. M., U. S. Army, 27-10; Fraenkel, *Military Occupation and the Rule of Law,* p. 183; Hyde, *International Law,* Second Revised Ed., Vol. 3, p. 688). The four military governors acting singly or jointly could not, under international law, create an international court binding upon Germany and its nationals, nor could the exercise of German sovereignty itself create an international tribunal (Annex to Hague Convention, 1907, Art. 23, 42-45; Schwarzenberger, *International Law,* Vol. 1, pp. 267-270; *Ville d'Anverz* v. *Germany,* 5 Mixed Arbitral Tribunal (1926), p. 712, at 716-719).

The Court below mistakenly drew the conclusion that the Control Council is supreme and that the zonal commanders derive their powers from it. The Court said, "This document (referring to 13 U. S. Dept. of State Pub.

596) confirms and reinforces the supreme authority with which the American Military Governor, in his capacity as Zone Commander, *was clothed* by the Council." From whence did the Control Council derive its *supreme* power, which, according to the Court below, it delegated to the American zone commander to exercise *as agent for it?* Certainly not from the four occupying powers for it was specifically decreed that the *supreme* authority be exercised by the Zone Commanders *on instructions from their governments, each in his own zone of occupation.* Therefore there could be no residuum of power remaining for any other body.

The Potsdam Conference reaffirmed the principle that each zonal commander was supreme in his own zone and that all four would coordinate policy on matters affecting Germany as a whole. Unlike the case of Japan, there was no general occupation of Germany as a whole. True that could have been done, but it was not. The documents establish that each zonal commander was the supreme power in his own zone, *acting as agent for his government and not for the Control Council.* No power or authority was or could have been obtained from the Control Council. That body existed only by sufferance and it did not *clothe* our zonal commander with any authority, much less make him its agent.

Being supreme in his zone, our military governor's powers could not be enlarged. There was no sphere to grant him authority beyond the supreme authority already conferred upon him by his government. His Control Council activities could serve only to coordinate policy and not to grant him power which his government and the customs of war had not already conferred upon him.

It should be noted also that the zonal commanders were directed by their governments to carry out policies agreed upon by the Control Council. If the Control Council were supreme, such directive was surplusage. The several governments, however, did not consider the Control Council

supreme. The independent action taken by each, singly or jointly with others, on matters affecting Germany as a whole, indicated that they did not regard the Control Council as having any authority whatsoever. (See footnote 34, supra, p. 43).

Another example of the independence and superior authority of the zonal commanders may be drawn from the action of General Clay in the case of Alfried Krupp. It indicated clearly that he did not regard the trial in that case, which was similar to the one against the petitioner, as derived from Control Council authority.[37]

Regardless of the character of the entity referred to as the Control Council, whether it be considered coordinating, policy making, legislative, or the successor of the German sovereignty, the joint sovereignty of the occupying powers, a condominium or a military alliance, its directive labeled No. 10 did not and, even if it purported to do so, could not, delegate to one nation the power to create international courts.

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[37] Art. II, Sec. 3(f) of Control Council Law No. 10 provided that any property declared to be forfeited "shall be delivered to the Control Council for Germany, which shall decide upon its disposal". The tribunal trying Krupp decreed forfeiture. General Clay reviewed the sentence solely in his capacity as the American zonal commander and decreed that each separate zone commander was authorized to confiscate Alfried Krupp's property. Nothing was delivered to the Control Council nor did it have any say in the matter of the disposal of Krupp's property. If the conclusion of the Court below is correct that the Control Council law was a supreme legislative enactment stemming from the joint sovereignty of the four victorious powers, then General Clay could not have acted in derogation thereof.

This is but one more showing that neither our zonal commander nor the others regarded Control Council enactments as law. The several zonal commanders disregarded and at times superseded Control Council enactments at will. Either the conclusion of the Court of Appeals is erroneous or each of the zonal commanders was acting in flagrant violation of superior authority. The theoretical conclusion of the Court below and the actual operations in the occupied zones of Germany are not consistent and cannot be made to coincide.

E. Control Council Law No. 10 on its face does not purport to authorize the Zonal Commanders to create international courts.

The first article of Control Council Law No. 10 specifically incorporates as "an integral part" thereof the London Agreement and the I M T Charter.

The preamble states that its purpose is "to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945 and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the international tribunal."

The so-called Control Council Law No. 10 was actually an agreement flowing from the policy coordinating functions of the Control Council *to declare the substantive law* and thus create "a uniform legal basis in Germany" as a whole for the prosecution of war crimes "other than those dealt with by an international tribunal." [38] Contrary to the holding of the Court below, Control Council Law No. 10, contains nothing authorizing or empowering a zone commander

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[38] In order *to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945,* and the Charter issued pursuant thereto and *in order to establish a uniform legal basis in Germany* for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

ARTICLE I

"The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. * * *

ARTICLE II

"1. Each of the following acts is recognized as a crime:"

(a) Crimes against Peace (defined).

(b) War Crimes (defined).

to create international tribunals but like the London Agreement reserves to each zonal commander the right to proceed in his own zone before an *appropriate tribunal* either German or the occupants' own military or national courts (R. 45-46).

In addition to declaring the substantive law, it contained provisions designed to facilitate the transfer of persons

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(c) Crimes against Humanity (defined).

"(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal. * * *

ARTICLE III

"1. *Each occupying authority, within its Zone of occupation.*

"(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested. * * *

* * * * * * *

"(d) *shall have the right to cause all persons so arrested and* charged, and not delivered to another authority as herein provided, or released, *to be brought to trial before an appropriate tribunal.* Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality or stateless persons, be a German Court, if authorized by the occupying authorities.

"2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

"3. *Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors.* Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

* * * * * * *

"(a) *A person wanted for trial* or as a witness *by an International Military Tribunal shall not be delivered for trial* or required to give evidence outside Germany, as the case may be, *except upon approval of the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.*" (Official Gazette of the Control Council for Germany, No. 3, pp. 50-54; R. 43-49.) Italics supplied.

between zones and designed to provide a uniform method for handling two classes of alleged war criminals, thereby avoiding conflicts between trials by the national military courts of the individual powers on the one hand, and the international tribunal provided for under the London Agreement upon the other. *It grants no power to create a new type of national or international court.*

In so far as international trials were concerned, the four commanders agreed that "Persons wanted for trial by an international military tribunal will *not* be tried without the consent of the Committee of Chief Prosecutors. Each zone commander will deliver such persons, who are within his zone, to the Committee upon request and will also make witnesses and evidence available to them" (R. 46). Nothing was agreed or declared that each zone commander should or may set up his own international court distinct from that prescribed by the London Agreement and bring persons to trial before it without the consent of the Committee of Chief Prosecutors. Just the contrary was decreed.

The four zonal commanders, by their enactment of Control Council Law No. 10, unequivocally declared their adherence to the London Agreement of 8 August 1945 and the Moscow Declaration of 30 October 1943. These documents, as is hereinbefore pointed out, are specific in their terms. It is impossible to reconcile the terms of the Moscow Declaration, the London Agreement, and the zonal commanders' expressly declared purpose to adhere thereto, with the holding of the Court of Appeals that Tribunal IV was an international court created under authority of Control Council Law No. 10, though not under the London Agreement. Control Council Law No. 10 is but a reaffirmance of the principles of the London Agreement.

United States Mil. Govt. Ordinance No. 7, pursuant to which Tribunal IV was created (R. 20-29), likewise reaffirms the principles of the London Agreement and at no time has the respondent been able to point out what clause of Control Council Law No. 10 or of Ordinance

No. 7, authorizes deviation from the terms and provisions of the London Agreement.[39]

The Court of Appeals points to that part of Article III, Section 2 of Control Council Law No. 10, which states, "The tribunal by which persons charged with offenses hereunder shall be tried, and the rules and procedure thereof *shall be determined or designated by each Zone Commander for his respective Zone*" as the one authorizing the creation of an "international tribunal" in violation of the express limitations contained in the London Agreement. That Court failed to take into account the second sentence of the same paragraph, which refers to only one type of international court, i.e., that authorized by the London Agreement, and the preceding and succeeding paragraphs which indicate clearly the Control Council's intent to give the London Agreement full force and effect.

Another important factor has been overlooked by the Court below. In our military law, the appointing authority may, within certain prescribed limits, when appointing military commissions or occupation courts, determine and designate "the rules and procedure thereof". *Ex parte Quirin,* supra; *In re Yamashita,* supra. Is it not more reasonable to conclude, in the light of the entire text of Control Council No. 10, that such was intended by Article

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[39] U. S. Mil. Govt. Ordinance No. 7, Article II c provides: "The Military Governor *may* in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases." The effect of this provision is twofold: *First:* It negatives the contention that the ordinance was designed to carry into effect the asserted authority of the Control Council to provide for tribunals automatically representative of the four occupying powers. *Second:* It emphasizes the fact that any further joint tribunals required subsequent specific agreement upon the part of the nation or nations to be joined with the United States and the specific agreement upon the part of the United States to the establishment of such joint tribunal. The order appointing Tribunal IV recites no agreement for a joint trial and in fact none was ever entered into (R. 20-29).

III, Section 2? Certainly the language employed does not warrant drawing the conclusion that a "one nation international court" was authorized.[40] And why may we ask should a matter of such import as the power to create "international tribunals" be left to inference? There was no ambiguity in the definition of the offenses or the declarations relative to the return and transfer of persons wanted in other zones. It would have been a simple matter to state "zonal commanders may appoint international courts". The fact that such intent is now sought to be spelled out of a few words, to which such meaning cannot be reasonably ascribed, bears out petitioner's contention that the whole theory of the internationality of the tribunal was an afterthought, invoked to prevent judicial review of a military trial which is without parallel in the annals of history.

Provision is made in Control Council Law No. 10, in the paragraph next succeeding the one to which the Court of Appeals refers, that no person will be brought before an international military court "without the consent of the Committee of Chief Prosecutors". The Committee of Chief Prosecutors is specifically referred to in the London Agreement and nowhere else is provision made for a Committee of Chief Prosecutors. This too indicates an intent to adhere to the principles of the London Agreement and Charter annexed. No consent of the Committee of Chief Prosecutors was obtained in this case, nor was petitioner wanted or ordered for trial by any international group.

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[40] Under elementary principles of construction, the Court must construe treaties and executive agreements so as to give full force and effect to all its parts (*U. S.* v. *Reid*, 73 F. 2d 153; certiorari denied, 299 U. S. 544), and so as to avoid conflict with statutes, orders and other decrees. *U. S.* v. *Pink*, 315 U. S. 203; *Nielsen* v. *Johnson*, 279 U. S. 47. Had the Court of Appeals in this instance followed these rules, the conflict which it states may "perchance" exist, between the London Agreement and Control Council Law No. 10, would have been obviated. Consideration of the whole of Control Council Law No. 10, its preamble, and all other parts, instead of one isolated clause, would have resulted in the construction here urged, i.e., that Article III, Sec. 2 thereof, did not constitute a grant of power and that the London Agreement was *not* superseded by the Control Council decree.

Every action taken against petitioner, from beginning to end, was conducted exclusively by United States authorities in the name of the United States alone and without consultation or collaboration with the other allied powers. It was the United States policy and plan to proceed with the secondary Nurnberg trials before American tribunals and not before an international court as now claimed. Mr. Justice Jackson said that was the intent (see subdivision C hereof), three Cabinet officers said that was the intent (Dept. of State Pub. 3080, p. 8), the President by his issuance of Executive Order No. 9679 amending Executive Order No. 9547, and his concurrence with the views expressed by Mr. Justice Jackson said that that was his intent [41] and General Clay indicated the same intent by singly acting on the sentence without conferring with the other powers, which he would have had to do, in the case of a joint or international tribunal (R. 28). General Clay acted rightly in so doing for there is nothing in Control Council Law No. 10 or United States Military

[41] Executive Order No. 9679: "1. In addition to the authority vested in the Representative of the United States and its Chief of Counsel by Paragraph 1 of Executive Order No. 9547 of May 2, 1945, to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis powers and their accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal, such Representative and Chief of Counsel *shall have the authority to proceed before United States military or occupation tribunals*, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by the said international military tribunal" (R. 53).

Referring to the above executive order, Mr. Justice Jackson in his report to the President said: *"Under your Executive Order of January 16, 1946, the war crimes functions devolve upon Military Government upon my retirement"* and that "he (General Taylor) would be named to take over the war crimes prosecution on behalf of military government. * * *" State Dept. Pub. 3080, p. 435.

General Memorandum No. 15 dated 29 March 1946 is to the same effect (R. 139).

Ordinance No. 7 which authorized him as the zonal commander to create international courts and he never pretended he had such powers.[42]

F. Tribunal IV and others similarly created, although labeled and regarded as U. S. Military Courts were termed "international" after appellate review was sought in the courts of the United States.

In the early stages of the trial the presiding justice of Tribunal IV said, "This *is* an American court" (Record of Trial, p. 15). Toward the end of the trial he

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[42] U. S. Military Government Ordinance 7, pursuant to which Tribunal IV was created (R. 30), does not purport to authorize the creation of an "international tribunal". This ordinance is a unilateral declaration by our military governor and vests in him no powers not authorized by the laws of war and the laws of this nation. Nothing is contained therein referring to any alleged power flowing from Control Council Law No. 10 to create "international courts". The entire document speaks of the establishment of American courts for the trial of war crimes, to be staffed by United States citizens and prosecuted by the United States alone. It does envision a case where one or more other governments may join with us in the prosecution. The parts specifically referred to state:

"Art. I. The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes."

"Art. II (b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. * * *

"(c) The Military Governor *may* in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. *In such cases the tribunals shall consist of three or more members as may be provided in the agreement.*"

"Art. XVII (b) In cases tried before tribunals authorized by Article II(c), *the sentence shall be reviewed jointly by* the Zone Commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders" (R. 20-29).

said, adopting the arguments advanced by the prosecution (R. 50): "The Tribunal *is not* a court of the United States as that term is used in the Constitution of the United States. It is not a Court-Martial. It is not a military commission. It is an International Tribunal established by the International Control Council, * * * The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States."

We thus have the interesting situation where a tribunal created by the military authority of the United States, composed of citizens of the United States, conducting its proceedings in the name of the United States, pronouncing its judgments and sentence in the name of the United States, committing those upon whom it passes sentence to confinement in a United States army prison, and operating at the sole expense of the United States, declaring itself to be an international tribunal, thereby avoiding compliance with the laws of the United States and withholding from those who came before it "due process of law."

How did so complete a reversal in the Tribunal's views, as to its own composition come about, from the time it declared itself to be American, to its later declaration that it was international? During the early stages of the trial, the prosecution was apparently little concerned with the character of the Tribunal. It was regarded as an American Tribunal and in any event the accused could not challenge the court, its jurisdiction, or its composition (R. 21). The accused had no right to appeal (R. 27). The accused, it was thought, could not seek review in the United States courts by writ of habeas corpus (*Ex parte Betz, et al.*, 329 U. S. 672). And so, for all practical purposes, the question of the true character of the court was academic.

In the later part of 1947, General Erhard Milch, who was tried before Tribunal II, which was composed and

organized along lines similar to Tribunal IV, filed an application in this court for leave to file a petition for a writ of habeas corpus (*Milch* v. *U. S.*, 332 U. S. 789). The 4-4 division of opinion in this court evidently caused the military authorities to re-examine their position.

Flick, who was still on trial, raised the question of jurisdiction in Tribunal IV. The Government responded, first with the contention that he had no right to raise such questions, and secondly that the failure to comply with American law was immaterial, since the court was giving effect to "quadripartite legislation" on substantive law and was therefore international.[43] This quadripartite legislation theory was rejected by the Court of Appeals, which, in its place, advanced a theory of its own.

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[43] The Prosecution argued: "By the promulgation of Control Council Law No. 10, however, the four Zone Commanders recognized that, with respect to offenses delineated therein which include crimes against peace, war crimes, and certain other crimes against civilian populations, the prosecution of Germans for offenses committed by them prior to such occupation was a matter affecting Germany as a whole, and therefore within the proper authority of the quadripartite governing body of occupied Germany. *The courts established by each Zone Commander to give effect to this quadripartite legislation are, therefore, international courts.* * * *

"The fact that the members of the Tribunal are citizens of the United States appointed by the Military Governor and the President of the United States in no way divests this Tribunal of its character as an occupational Tribunal * * * (R. 175).

"Similarly irrelevant is the fact that the case is brought in the name of the United States of America. The United States may bring suits in court other than those under the jurisdiction of the United States. It may sue in the courts of any country by leave of the government concerned. * * *

"That this Tribunal is not a military commission. * * * Whatever may be the lawful scope of the jurisdiction of military commissions, the jurisdiction of this Tribunal extends not only to violations of the law of war (war crimes) but to all other crimes recognized by Control Council Law 10 from which this Tribunal derives its jurisdiction." (Government's memorandum dated 24 November, 1947, pages 10-12.) (Italics supplied.)

Several of the tribunals and its members, always adhered to the theory that the tribunals were American institutions. The presiding justice in Tribunal III, which was composed and organized like Tribunal IV and which Tribunal was trying the case against Alfried Krupp, et al., said: "The prosecution is by the United States of America, as shown by the indictment and all other proceedings in the case (Krupp Record of Trial, pp. 603-604)".

Tribunal II, which was composed and organized like Tribunals III and IV, had this to say on the subject of its status, "It must be constantly borne in mind that this is an American court of justice, applying the ancient and fundamental concepts of Anglo-Saxon jurisprudence which have sunk their roots into the English common law and have been stoutly defended in the United States since its birth" (Tribunal II, Record of Trial, Judgment, p. 8).

Another justice, sitting on Tribunal II, stated in a concurring opinion, "The American flag in this courtroom assured to the defendant the guarantees of the United States Constitution as to a fair trial."

Only recently one of the members of these courts still expressed the belief that he was sitting in United States Military Tribunal. Judge James Morris of the North Dakota Supreme Court, who was a member of Tribunal VI, which tried the case against other industrialists (The I. G. Farben Directorate) and which was composed and organized along lines similar to Tribunal IV said:

"In early July of 1947 at the instance of the War Department, I left Bismarck for Germany to act as a judge in the trial of major war criminals at Nurnberg, and thus became a participant in a judicial experiment that will long remain a subject of discussion and comment by scholars and students of international affairs. * * *

"The Nurnberg War Crimes Trials were the result of a number of conferences between representatives of the United States and some of our allies in the struggle against

the Axis Powers. These Conferences [44] may be considered basic authority for the trials. * * * Tribunal VI was an American Tribunal. The case tried before it, was instituted by the Chief of Counsel for War Crimes * * * a Brigadier General in the United States Army. His assistants, though not all American citizens, were employed and paid by the War Department. The Marshal of the Court and his assistants were American army officers. *No other nation had a voice in who should be tried.* Military Government Ordinance No. 7 vested in the Chief of Counsel the exclusive power to determine the persons to be tried by the tribunals.[45] As a courtesy to our allies the Chief of Counsel invited other governments to send observers to the trials * * *." (N. Dakota Bar Briefs, Journal, State Bar Assoc., Vol. 25, April 1949, No. 2, pp. 97 and 108.)

Requests emanating from United States occupation authorities to the British occupation authorities, pursuant to Article IV of Control Council Law No. 10, for the extradition of Bernhard Weiss, a co-accused of this petitioner, and of Ewald Loser and Alfried Krupp, in another case, *specifically stated that these persons were wanted for trial*

[44] Presumably the conferences referred to were those in which Mr. Justice Jackson took part—a verbatim report of which is contained in State Dept. Pub. 3080. That report indicates that those conferences are *not* authority for the exclusively American courts which it is claimed were established at Nuremberg to function as international bodies. Just the contrary is true. The conferees were in agreement that such tribunals could not be established and that no truly international organization could exist with only one participant. At page 149 Mr. Justice Jackson agreed with General Nikitchenko who said, "but unless all four countries are represented in it then it would lose its character of being an international tribunal". At page 251 Prof. Trainin said, "Now, if it is permitted that the prosecutor representing one country could carry a case through himself, that completely destroys the international character of the whole case". See also pp. 150, 251-2, 254.

[45] U. S. Military Government Ordinance No. 7 did *not* vest exclusive power in the U. S. Chief of Counsel to determine who shall be tried before an international court. He was vested with such powers only in cases to be tried before our own national courts (R. 20-29, 53, 55).

before a United States military tribunal. All papers and documents referred to these tribunals as being United states tribunals.[46]

General Lucius D. Clay, by General Order No. 21, Hq., European Command appointed the members of the court which tried petitioner. There was nothing in that order to indicate that the character of the Tribunal was anything but American (R. 29). It, therefore, may rightly be regarded as an American institution (*Stebbins* v. *Duncan*, 108 U. S. 32).

G. Tribunal IV which tried petitioner was not in fact an international court.

In *Hirota* v. *McArthur, et al.* (supra), the government argued at length that the court which tried Hirota was international because its authority and creation stemmed from an international body, namely the Far Eastern Commission, and that it functioned as an international organization. They pointed out that the tribunal consisted of representatives of eleven nations; that the indictment was brought in the name of the eleven nations; that the prosecution was conducted by counsel acting on behalf of each participating nation; that the review was

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[46] Colonel John E. Ray, whose official title was "Secretary General United States Military Tribunal", certified to documents in substantially the following form:

"I, John E. Ray, Colonel, FA, Secretary General of *the United States Military Tribunals,* DO HEREBY CERTIFY that the foregoing is a true and exact copy of a mimeograph document now in my custody, which mimeograph document is a part of the official files and records of *the United States Military Tribunals,* of which I am the lawfully designated custodian.

EUCOM GENERAL ORDER No. 89, 9 August 1947, constituting Military Tribunal VI and designating the members.

Dated: *7 April 1948*
Stamp:
US Military Tribunals
Nurnberg

JOHN E. RAY, Colonel, FA
Secretary General
United States Military Tribunals
By BARBARA SKINNER MANDELLAUB
Chief of Archives
Office of Secretary General for
United States Military Tribunals"

had in conjunction with all the participating nations, and that in fact it bore "the outward appearance of an international enterprise" (Govt.'s Brief, *Hirota* case, pp. 14, 15, 45, 63, 65-70, 87). The same, of course, was true of the I M T which tried Goering, et al. The powers and jurisdiction of that court stemmed from an international pact—the London Agreement—and it likewise functioned as a truly international tribunal. The I M T consisted of representatives of four nations and acted on behalf of those nations. The "indictment" was brought in the name of four nations; the prosecution was conducted by counsel acting on behalf of each participating nation; the review was had in conjunction with all the participating nations and it, in fact, bore "the outward appearance of an international enterprise".

The court which tried petitioner, however, was one of entirely different character. Its powers stemmed from the military governor of the American zone of occupied Germany who was acting pursuant to his own ordnance (Mil. Gov't. Ord. No. 7 (R. 20-29)), and it functioned as a *national* institution of the appointing power. There are many points of *dissimilarity:*

1. In the Tokyo and I M T cases, the court was called an International Military Tribunal. In this case it was referred to as United States Military Tribunal.

2. In the international cases, the indictment was brought in the name of the several powers creating the court. In this case it was in the name of the United States alone.

3. In the international cases, judges who were nationals of the several prosecuting powers, sat upon the court. In this case, only American judges participated.

4. In the international cases, the several governments themselves selected the judges. In this case, the U. S. Military Governor made the selection.

5. In the international cases, all expenses of the trial were borne by the several governments jointly. In this case, all expenses were borne by the United States.

6. In the international cases, the indictments were lodged by several counsel acting on behalf of each participating nation. In this case, the indictment was lodged by an American counsel acting for the United States alone, and without consultation with the other powers. General Taylor specifically stated that he was "acting on behalf of the United States of America" (R. 130).

7. In the international cases, the prosecution was conducted by prosecutors appointed by each participating nation. In this case, the prosecution was conducted only by a United States prosecutor.

8. In the international cases, the investigation and preparation for trial were carried on by representatives of the several participating nations. In this case, the investigation and preparation for trial were conducted by representatives of the United States alone.

9. In the international cases, the flags of participating nations were displayed in the courtroom. In this case, only the United States flag was shown.

10. In the international cases, there was no opening formality for each day's session. In this case, every session was opened with a declaration by the Marshal: "God save the United States and this honorable tribunal."

11. In the international cases, the procedure followed was as agreed upon between the participating powers. In this case, the procedure followed was that outlined in U. S. Mil. Gov't Ordnance No. 7.

12. In the international cases, at least in so far as the I M T trial was concerned, the sentenced prisoners were ordered detained at Berlin-Spandau, a prison operated by representatives of the several nations who participated in

the trial. In this case, Flick is detained at Landsberg Prison in the U. S. zone of occupation, which prison is under the exclusive jurisdiction and control of the U. S. Army.

13. In the international cases, at least in so far as the I M T trial was concerned, the review of sentence was conducted by representatives of the participating nations. In this case, the review of sentence (there is none as to legal sufficiency) was only by General Clay, the appointing authority.

14. In the international cases, at least in so far as the I M T trial was concerned, the sentences were ordered executed by representatives of the participating nations. In this case, the sentence was ordered executed only by the U. S. Military authorities.

In the light of these facts, it cannot be concluded that the tribunal before which petitioner was tried was international in character. Every pertinent fact indicates the contrary. The responsible official of the British government, when questioned in the House of Lords respecting Britain's participation and responsibility for the Nuremberg trials, following the original I M T trial, announced unequivocally that His Majesty's government "* * * had no responsibility whatsoever for the trials" (Parliamentary Debates, House of Lords Official Report, Vol. 163, No. 93, p. 924, 6 July 1949).

It is not known what the Russians have done in their zone respecting the prosecution of war criminals subsequent to their participation in the I M T trial. We do know however, that Russia had nothing to do, directly or indirectly, with the conduct of the trial against petitioner and has never authorized the establishment of any international court other than the one agreed upon in the London Agreement.

In so far as Great Britain is concerned, that nation has established its own national courts in its zone for the

prosecution of war criminals and does not consider that such courts are international in character, although the substantive law declared by Control Council Law No. 10 is applied. Great Britain has also entrusted certain war crimes prosecutions to the German courts. Those courts are not considered international although they too apply the control council's definition of offenses and act pursuant to so-called "quadripartite legislation". In addition, Great Britain allows the convicted to appeal and has also authorized the bringing of writs of habeas corpus by those who claim to have been illegally or improperly imprisoned (British Mil. Govt. Ord. Nos. 47, 68, 69).

The U. S. Military Authorities deny all right of appeal and also deny the right to bring *habeas corpus* proceeding in the occupied zone. The bringing of writs of habeas corpus by persons detained in the United States zone is authorized, *except persons who were tried before courts which, like Tribunal IV, were appointed pursuant to Mil. Gov't Ordinance No. 7* (U. S. Mil. Gov't Ordinance No. 23).

In the case of France, it too has established its own national courts for the trial of war criminals and does not regard its courts as endowed with international characteristics (French Mil. Govt. Ord. No. 36). A German industrialist named Roechling was convicted by a French occupation court established pursuant to authority reserved to each government by the London Agreement and Control Council Law No. 10. It was never asserted that the tribunal was international, even though the offenses charged were in violation of the substantive law provisions of Control Council Law No. 10. General Clay, in a letter addressed to the association of German steel engineers, dated 18 October 1948, stated that the U. S. had no responsibility for the proceeding conducted against Roechling and referred to the proceeding as "a French undertaking."

It thus appears that each of the occupying powers, including the United States, has asserted that it was not responsible for the war crimes trials conducted in the other zones of occupation. The fact is that we have taken

no part in the English, French or Russian trials, and none of those nations has taken part in our trials. No nation in Europe has purported to conduct "an international trial" for alleged war crimes after the conclusion of the I M T trial. Tribunal IV was purely an American institution and the proceeding against petitioner had no international aspect.

H. Even if it be assumed that the joint military declaration (Control Council Law No. 10) authorized or required "war crimes" courts to apply the *substantive law* defined therein, nevertheless the Tribunals applying such laws are not international.

Respondents did not argue in the Court below that Law No. 10 authorized each zonal commander to establish international courts. The Government argued that since Tribunal IV was applying international substantive law, as formulated by the Allied Control Council and by the I M T, that therefore it was acting "under an international Governmental authority separate from the sovereignty of the United States" (Appellees' Brief, p. 9).

The Courts of the United States almost daily apply international law as formulated by international governmental agreements, but they nevertheless continue their character as courts of the United States. Military commissions apply international law but do not thereby become international courts. In the cases of Generals Yamashita and Homma, both of whom were tried by military commissions for violations of international law, the Government did not contend that such commissions were international tribunals or that they functioned pursuant to international authority (Govt.'s Brief, *Hirota* case, p. 71). The mere fact that a tribunal, military or civil, applies international law, does not cause that tribunal to take on the character of an international institution.

The Court below either misconceived or ignored the argument of the Government, i.e., that Tribunal IV was international in character because it was applying criminal substantive law as defined by "quadripartite legislation",

and held that Tribunal IV was international because it was created and vested with jurisdiction by joint declaration of the four victorious nations. No authority was, in fact, granted by the Control Council to any one of its members to create international courts. Such tribunals may have been established by the joint action of the participating nations and in accord with the London Agreement, but that was not done here.

If the Government's argument is followed to its logical conclusion, then any court, be it English, French, Russian, American or German, if it seeks to punish offenses declared to be such by Control Council Law No. 10, or if it seeks to punish offenses which were declared to be crimes by the I M T, then the mere fact of so doing makes it "international". Surely the many courts operating throughout Germany and in the surrounding areas, which have been and still are punishing war criminals on the basis of what was declared to be a crime in Control Council Law No. 10 and the judgment of the I M T, would be surprised to learn that they have reached the stature of an international tribunal. Nevertheless, if the reasoning of the respondents in the Court below is correct, that result follows, because their power and jurisdiction may, with equal logic, be said to have "stemmed directly from the Control Council." Obviously the whole theory is not tenable.

The closest parallel to this situation is that involving Prize Courts and other courts which international law and international agreements require or authorize to be established for the adjudication of rights. It has been held that such courts and others established for the fulfillment of international obligations by one of several states does not make such tribunals international, nor does the fact that such tribunal applies international law necessarily make it international (The Invincible, Fed. Case No. 7054; The Paquete Habana, 175 U. S. 677; *U. S.* v. *Holmes*, 5 Wheat. (U. S.) 412).

Under international law belligerents are required to establish Prize Courts to determine the validity, according

to international law, of captures made by belligerents. British Prize Courts assert that they apply international law pursuant to their international obligations, nevertheless British Prize Courts are considered domestic or national courts in the true sense of the word. *The Zamora,* Judicial Committee of the Privy Council, 1916; Briggs, *The Law of Nations,* 1946, p. 966; Wheaton's Int. Law by Keith, 7th Ed., Vol. 2, pp. 598-9; Oppenheim, *Int. Law by Lauterpacht,* 6th Ed., Volume II, pp. 728-9; Hyde, Int. Law, 2nd Ed., Vol. III, pp. 2365-6.[47]

Pursuant to international agreement between the governments having riparian rights on the Rhine River, infringements of shipping regulations by the riparian governments must be tried before Rhine shipping law courts which every riparian state must institute separately (Mannheim Revised Shipping Act of October 17, 1868; British & Foreign State Papers, Vol. LIX, pp. 470-81). Such courts, although they apply the substantive law decreed by the riparian states jointly, are nevertheless not regarded as international and appeals from the decisions of those courts set up by the various riparian governments are heard in the appeals courts of the respective nations.

Another example is the state or province courts which are required to be set up by the state or province as members of a federal union. In the United States, each

[47] Oppenheim states, "Although belligerents have, in certain circumstances, according to International Law, the right to capture neutral vessels, and although they have the duty to bring these vessels for trial before a Prize Court, such trials are not an international matter. Just as Prize Courts are municipal institutions, so trials of captured neutral vessels by these Prize Courts are municipal matters."

Hyde says: "The willingness with which a belligerent State may clothe its prize courts with a wide jurisdiction, and with freedom in the exercise of it to apply the law of nations, may render obscure the fact that that law is not itself a source of jurisdiction. Regardless of the places to which such a court is permitted to turn in its search for the law which is to govern its conclusions, it remains necessarily a domestic tribunal whose authority to act is derived exclusively from the will of the sovereign which created it."

State is required to establish courts for the adjudication of rights; such courts must apply the laws of the United States, they are nevertheless not federal institutions.

Even assuming that Control Council Law No. 10 committed our zonal commander to establish courts such as Tribunal IV and to apply the Control Council's definitions of crime, nevertheless the Tribunal would not be international because the fulfillment of international obligations by organs of the obligor state does not make those organs international, nor does it make courts so established international even though they apply international law. (Oppenheim, *Int. Law,* supra.)

By various Control Council decrees, German courts are authorized to function in the occupied zones of Germany and are duty bound to apply the substantive law decreed by the Control Council. It has never been asserted that such German courts, operating by quadripartite authority, are anything but German courts. British Mil. Govt. Ordinance No. 47 dated August 30, 1946, authorizes the German courts to punish certain crimes, declared to be such by Control Council Law No. 10. They nevertheless continue to remain German law courts. Were the rule otherwise, some strange results would follow.[48]

The determination as to whether an institution is national or international does not depend upon the answer to the

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[48] Similar to Control Council Law No. 10, Control Council Directive No. 38 decreed that so-called denazification courts be established by the German authorities for the trial of Nazi party members. It further decreed categories of offenses and punishments. Pursuant to such directive, the German authorities established judicial organs for the trial of cases against thousands of persons. It has never been intimated that these courts were international. Time and time again it has been asserted by the American military authorities that the carrying out of the denazification program was purely a German matter—this despite the fact that it is being carried out pursuant to a Control Council decree and pursuant to the foreign policy of the United States. It would be incredible to hold that the one man tribunals established pursuant to Control Council Directive No. 38 are international. Yet the Government's argument followed to its logical conclusion leads to that result.

question whether the institution is internationally *prescribed* and still less upon whether its establishment is only internationally *authorized*. The determination depends upon whether the institution was established and its competences prescribed by a single state, regardless of whether or not that state is acting pursuant to authority or direction of a group of governments. If an institution or a tribunal is prescribed by joint action and functions by joint action, such as the Far Eastern Commission court, the I M T, the Mixed Arbitral Tribunals, then it may be said to be international. If such institution or tribunal is prescribed by a single state and its competences declared by a single state and its functions performed by a single state, even though authorized or required by agreement of several states, then it is *not* international.

I. The opinion and decision of the Court below.

Had the Court below not ruled summarily upon the issues here raised and had it given the petitioner an opportunity to offer evidence, oral and documentary, we would not now have to refer to matters *dehors* the record.

It is elementary that such opportunity must be given to a litigant in all proceedings including *habeas corpus* (*Price* v. *Johnston*, 334 U. S. 266; *Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnston*, 312 U. S. 275).

In *Price* v. *Johnson*, supra, at p. 291, this Court said, "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. Cf. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249."

This matter came before the District Court of the United States for the District of Columbia, on an order to show cause why a writ of habeas corpus should not issue, signed on 15 March 1948. To show reasonable cause to the Justice issuing the rule, there was attached to the petition for the writ of habeas corpus, certain material exhibits, but it was not intended to attach all the voluminous relevant documents on file in the War and State Departments or to try

the case on the pleadings. Such documents would be the subject matter of proof upon a hearing and could only be secured by the issuance of a subpoena returnable on the day of trial. The Answer to the Rule to Show Cause, in addition to other issues raised, alleged that the District Court was without jurisdiction because the petitioner was not physically within the territorial limits of the District of Columbia (R. 12). On the return day the District Court considered that issue only (R. 17) and ruled that the petition be dismissed for lack of jurisdiction (R. 20).

During the course of the hearing before the District Court, counsel for the petitioner asked that a subpoena *duces tecum* be issued for the production of certain records and documents necessary to establish the allegations of the petition. The District Judge stated that he was deciding the matter solely upon the ground that the petitioner was admittedly held in confinement outside the territorial limits of the District of Columbia, and added, "I am not taking any evidence."

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the petitioner argued but one question, i.e., that the District Court is vested with power to issue the writ despite petitioner's detention overseas (cf. *Ahrens* v. *Clark*, 335 U. S. 188) and that the dismissal of the petition for lack of jurisdiction constituted error. In the prayer for relief it was requested that the order be reversed and that the case be remanded to the District Court for a hearing on the controverted issues of fact.

On May 11, 1949, the Court below, upon the authority of *Eisentrager et al.* v. *Forrestal et al.* (174 F. 2d 961, decided April 15, 1949), held that the District Court *did* have jurisdiction but affirmed the order of the District Court upon a new ground, namely, that the "tribunal which tried and sentenced Flick was not a tribunal of the United States. Hence the District Court was without power to review its judgment and sentence." The crucial facts on this subject had not been developed. The petitioner had

been denied the opportunity of developing them, despite the admonition of this Court that appellate courts may not make "factual determinations which may be decisive of vital rights where the crucial facts have not been developed." The determination which was made by the Court below was obviously not predicated upon all the facts and of necessity reference to documents outside the record must here be made.

In the Court of Appeals, the respondent raised the question of the international character of Tribunal IV and petitioner was called upon to file a reply brief, but the record itself was not sufficiently complete for the consideration of such issue and petitioner so advised the Court.[49] Nevertheless, the Court below precluded the petitioner from making the desired showing and *decided the issues on a ground different from that which was argued by the respondents.*

The respondents argued, "*The International Military Tribunal tried but one case,* that of Hermann Goering et al." (Appellee's Brief, p. 5). They continued, "Appellant's petition, in showing he was an enemy alien tried *under the existing law of Germany,* as formulated in Allied Control Council Law No. 10, and [as formulated] by *an* international tribunal, demonstrates lack of jurisdiction to question his detention" (App. Brief, p. 7). It will be noted that the respondents here argued that review should be denied be-

[49] Petitioner argued (p. 18, Reply Brief): "There are many documents, papers, and records on file in the War Department which will establish the fact that there was nothing international or multinational about the tribunal which tried petitioner. It was an American creature pure and simple, created by military directive without the sanction of law and in violation of many international agreements relating to the obligations and duties of an occupying power. A hearing on the merits, when appellant can cause to be produced certain evidence in support of his position, will sustain his contention. Presently appellant is able to demonstrate only *prima facie* that there is nothing 'international' about the court which tried him, and nothing 'international' about the power which holds him in custody."

cause petitioner was tried *under the existing law of Germany* as formulated by the Control Council and by "an international tribunal", presumably the IMT, and regardless of the fact that petitioner was tried solely by an American tribunal and held in custody solely by Americans, that the legality of his detention may not be questioned. Respondents then argued that "The military tribunal acted under an international governmental authority [50] separate from the sovereignty of the United States and its acts are not subject to unilateral review" (App. Brief, p. 9). • • • "Even assuming that the tribunal which tried appellant acted under the authority of the United States, nevertheless its acts were in implementation of an international agreement that incorporated the foreign policy of the United States and as such should not be subject to review by a United States court" (App. Brief, p. 14). They continued: "The acts of *executive tribunals* in implementation of international executive agreements incorporating foreign policy have been held to be matters peculiarly within the competency of the executive and not subject to review by the courts" (App. Brief, pp. 15-16). The Government's argument is concluded with the following, "If the civil courts should intervene in such matters incalculable harm might result, both through the loss of prestige to the military authorities responsible for the conduct of the occupation of conquered countries and through an upsetting of the balance of relationship between the United States, and the other Allied powers" (App. Brief, p. 17).

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[50] Whether American judges, army officers and others in the employ of the U. S. may accept such office and perform such duty without the prior consent of Congress raises a serious constitutional question. Art. 1, Sec. 9, clause 8. The Attorney General has ruled that they could not. 6 Op. Atty. Gen. 409 (1854); 13 Op. Atty. Gen. 537 (1871); 24 Op. Atty. Gen. 116 (1902); 40 Op. Atty. Gen. 513 (1947); Congress is apparently of the same opinion. Act of July 20, 1942, 56 Stat. 662; 10 U. S. C. 1423a.

The Government unquestionably advanced some strange doctrines. In the United States there is no such thing as an "executive tribunal" whether in implementation of foreign policy or in ratification of political decisions. Mr. Justice Jackson made that quite clear.[51] In a document dated January 22, 1945, signed by the Secretary of State, the Secretary of War, and the Attorney General, the exercise of political power for the punishment of war criminals in Europe was rejected.[52] With the President's concurrence, Mr. Justice Jackson followed through on that rejection. He argued at length against punishing war criminals

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[51] "In the first place," Mr. Justice Jackson said, "the President of the United States has no power to convict anybody. He can only accuse. He cannot arrest in most cases without judicial authority. Therefore, the accusation made carries no weight in an American trial whatever. These declarations are an accusation and not a conviction. That requires a judicial finding. *Now we could not be parties to setting up a mere formal judicial body to ratify a political decision to convict.* The judges will have to inquire into the evidence and reach an independent decision. There is a great deal of realism in Mr. Nikitchenko's statement. There could be but one decision in this case—that we are bound to concede. But the reason is the evidence and not the statements made by heads of state with reference to these cases. *That is the reason why, at the very beginning, the position of the United States was that there must be trials rather than political executions. The United States feels we could not make political executions. I took that position publicly. I have no sympathy with these men, but, if we are going to have a trial, then it must be an actual trial. That is the position of the American Government,* and it troubles me a bit to think of trying to solve by a subcommittee so fundamental a disagreement as to trial." (Dept. of State Pub. 3080, p. 115). (Italics supplied.)

[52] The memorandum states that political execution "would be violative of the most fundamental principles of justice, common to all the United Nations," and recommends to the President "that the just and effective solution lies in the use of the judicial method" (Dept. of State Pub. 3080, p. 6). Thus it was recommended that the President *stay* the exercise of his *political power* and instead *submit* such accused persons to *judicial* decision. The acceptance by the President of the recommendations contained in the report, constituted an election by him to stay the exercise of political power and submit such accused persons to judicial decision. Subsequent action on his part indicates that such intention was carried out. In the Pacific theatre, the President elected to exercise his political power in the matter of war crimes as was pointed out in

by political action. "The U. S.," he said, "is vigorously opposed to any such political disposition." It "would look like, and would be, a continuation of Totalitarian practices" (Dept. of State Pub. 3080, pp. 33, 35). The "just and effective solution lies in the use of the judicial method" (Dept. of State Pub. 3080, p. 6, see also pp. VI, IX, 9, 16, 18, 30, 34, 36, 46, 105, 115, 150, 213).

The respondent's argument that review may cause harm and loss of prestige to the military and that balanced relationships may be upset like its earlier arguments, is untenable. England allows appeals in war crimes cases and evidently does not fear any loss of prestige or upsetting of balance of relationship. Its occupation courts trying war criminals apply the substantive law promulgated by the Control Council and are just as "international" as Tribunal IV. Rather would not the military's prestige rise if the stamp of approval were placed by our highest court on its action in creating Tribunal IV?

The Court below, however, *did not* adapt the basic arguments of the respondents, but held that Tribunal IV was "international" on the ground that the Control Council delegated power to the zonal commander to establish same. The Court of Appeals apparently overlooked the true character and function of the Control Council; the fact that the four governments jointly agreed that the Control

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Hirota v. *MacArthur*. Mr. Justice Douglas said that the tribunal there created "did not act as a free and independent tribunal to adjudge the rights of petitioners under international law". It did not sit as a judicial body. In Europe, however, it was decided to proceed by a judiciary and Mr. Justice Jackson so stated (see preceding footnote). In addition, in the light of the Hague and Geneva Conventions, the *private inhabitants* of a conquered territory are *not* subject to political executions or punishments. However, it is not necessary to discuss that matter, for here punishment "by due legal process" was ordered (Dept. of State Pub. 2783, European Series 23, p. 21). The foreign policy of the United States, incorporated in the London Agreement, provides for *judicial determination of guilt* of the major war criminals by an international court and others by national or occupation courts, and neither the Control Council nor the American zonal commander was empowered to deviate therefrom. Tribunal IV therefore was not functioning in "implementation" of our foreign policy, but directly contrary to it.

Council may *not* establish or authorize the establishment of international courts; the fact that Control Council Law No. 10 does *not* authorize the zonal commanders to create "international bodies"; the fact that Tribunal IV lacked all the indicia of an international body; and all the other facts hereinbefore set forth and the conclusions reached by the Court below, are inaccurate on both the law and the facts.

Whether Tribunal IV was an international or national court involves a mixed question of law and fact and both sides should have been given full opportunity to present their views. Failure to do so caused the lower Court to commit the errors here sought to be reviewed.

J. The U. S. District Court for the District of Columbia has jurisdiction over the cause and both the U. S. Court of Appeals for the District of Columbia Circuit and this Honorable Court have appellate jurisdiction thereof.

The petitioner is held in confinement not by political decision, but by judicial determination of a military tribunal of special and limited jurisdiction and it is within the province of the federal courts to inquire into the constitution and organization, of such tribunals, their jurisdiction over the person and the subject matter by *habeas corpus* proceedings (*Ex parte Quirin,* supra; *In re Yamashita,* supra; *Carter* v. *McClaughry,* 183 U. S. 365; *Collins* v. *McDonald,* 258 U. S. 416; *Grafton* v. *U. S.,* 206 U. S. 333; *Dynes* v. *Hoover,* 20 How. (U. S.) 65).

The fact that the petitioner is held outside the District of Columbia does not destroy the District Court's jurisdiction. *Hirota* v. *MacArthur,* supra. The arguments of the petitioner in the Court below, respecting jurisdiction, were adopted in their entirety by the Court of Appeals and incorporated in the opinion in the case of *Eisentrager* v. *Forrestal,* 174 F. 2d 961. Petitioner there pointed out that to deny jurisdiction would do violence to Art. I, Sec. 9, Cl. 2 of the Constitution. (*Martin* v. *Hunter's Lessee,* 1 Wheat. (U. S.) 304; *Ex parte Merryman,* Fed. Case 9847; *McNally* v. *Hill,* 293 U. S. 131; *Ex parte Anderson,* 121 Eng. Re-

ports 525; *Carus Wilson's Case,* 115 Eng. Reports 759; III Blackstone Comm., 129, 131 and other authorities cited in appellant's brief, Court below.) The question, reserved in *Ahrens* v. *Clark,* 335 U. S. 188, has been resolved in favor of the petitioner and no further argument will be presented on that phase of the case unless requested by this Honorable Court.

Unquestionably the petitioner is "in custody under and by color of the authority of the United States" and falls squarely within the provisions of 28 U. S. C., Chapt. 153, formerly 28 U. S. C., Chapt. 40. That the mandate of this Court or of the District Court may be made effective against the respondents has also been decided in *Eisentrager* v. *Forrestal,* supra, which case was cited with approval in Mr. Justice Douglas' opinion in *Hirota* v. *MacArthur,* supra.

The government in its brief in the *Hirota* case (pp. 34-37), argued that the Secretary of Defense and the Secretary of the Army were not within the chain of command in so far as General MacArthur's performance of duty as Supreme Commander for the Allied powers was concerned; that they could not issue orders to him and therefore that they were not proper parties respondent. The government stressed the fact that General MacArthur was acting as the agent for the Far Eastern Commission and was not under the command of the military officials in Washington. Regardless of the validity or invalidity of that argument (on its face it appears to be devoid of merit), it, nevertheless, is not applicable here because the two situations are not parallel.

That the petitioner is held in a U. S. military prison, operated and controlled solely by U. S. military officials, is not disputed. Under such circumstances, the key that holds him in custody could be turned by direction, through the chain of command, of the superior military officers in Washington. Failure or refusal to obey by the subordinate custodians in Europe is punishable by death (Article of War, 64). In any event the jailor or warden must comply with the demands of his sovereign although he is outside the country. *Blackmer* v. *U. S.,* 284 U. S. 421.

The government in its brief in the *Hirota* case, at page 37, after arguing that the military officials in Washington could not direct General MacArthur because of the peculiar situation that existed there, said, "The situation is of course very different, as applied to persons tried by Court-martial under Articles of War, for there the Secretary of the Army does have real and effective authority." Whether a prisoner was tried before a court-martial or before a military commission is of little consequence. The question revolves around the power of the Secretary of Defense and the Secretary of the Army to issue orders to the jailor—a United States Army officer in a lower echelon in the chain of command. Under the factual situation here presented, that power unquestionably exists in the named respondents. Mr. Justice Douglas in *Hirota* v. *MacArthur*, supra, very aptly said: "For we would have to conclude that the United States Generals who have custody of petitioners are bigger than our government to hold that the respondent-officials of the War Department have no control or command over them. That result would raise grave constitutional questions as *Eisentrager* v. *Forrestal*, supra, suggests."

Jurisdiction does exist and the Courts below are vested with power to issue the writ of habeas corpus. This Court may likewise issue the writ in aid of its appellate jurisdiction. 28 U. S. Code, Chapt. 153; *In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *Ex parte Baez*, 177 U. S. 378; *Whitney* v. *Dick*, 202 U. S. 132. That is so even though this Honorable Court has no appellate jurisdiction by writ of error over the judgment. *Ex parte Siebold*, 100 U. S. 371. This Court may, therefore, issue a writ of habeas corpus and put an end to this protracted litigation.

CONCLUSION

If judicial sanction is given Tribunal IV, and to its proceedings on the theory that it is an "executive" tribunal, "international" in character, and therefore free to function without regard to due process—then no person, be he

industrialist, jurist, educator, political, military or religious leader, or private citizen, will have any protection against the victor in any future war.

The way has been opened. The conqueror or conquerors are now free to define offenses ex post facto; create tribunals of their own design and liking; direct their functions and procedure; dress them with the cloak of judicial authority; declare them to be international, and the defeated populace must remain helpless. The victor in any future war may, by such legal paraphernalia, exterminate or imprison such part of the conquered inhabitants as it chooses.[53]

The road is now open for the victorious militarist—an avenue which after centuries of struggle the enlightened nations sought to close by agreements and conventions. Militarists are now empowered to act practically without restraint. The inhabitant of a conquered area may be tried because of personal dislike, because of a desire to secure his property or fortune, or for other reasons sufficient to the conqueror. There is no appeal except to the conscience of the conqueror.

On the precedent of this case, the Communists in China, by an "international tribunal" set up by one or all of the several Soviet Republics, may imprison or execute the political, military, religious, industrial or other leaders of China. Unquestionably, many Chinese patriots aided their country in her fight against the Communist insurrection. Some of them undoubtedly helped build the Chinese war machine. But now they may be declared "war criminals" and their lives and property forfeited at the will of the conqueror. Like action may be taken against the inhabitants of other defeated nations. Where this dangerous process will end, no one knows.

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[53] Even our own nationals are not beyond the power which the military may exercise, ostensibly acting under international authority. Mr. Justice Douglas pointed that out in *Hirota* v. *MacArthur*, supra. He also expressed concern that such unbridled power may lead to serious results unless now checked by inquiry beyond the mere character of the tribunal.

We can pay no more fitting tribute to the late Mr. Justice Murphy, than to quote his language in *Homma* v. *Styer*, 327 U. S. 759, 760-761. He said: "To try the petitioner in a setting of reason and calm, to issue and use constitutional directives and to obey the dictates of a fair trial are not impossible tasks. Hasty, revengeful action is not the American way. *All those who act by virtue of the authority of the United States are bound to respect the principles of justice codified in our constitution.* • • • Tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world. The time for effective vigilance and protest, however, is when the abandonment of legal procedure is first attempted. A nation must not perish because, in the natural frenzy of the aftermath of the war, it abandoned its central theme of the dignity of human personality and due process of law."

Mr. Justice Jackson aptly said, in his opening statement before the IMT, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well" (Dept. of State Pub. 2783, E. Series 23, p. 142).

Petitioner respectfully prays that the writ of certiorari herein requested be granted.

Respectfully submitted,

JOSEPH S. ROBINSON,
EARL J. CARROLL,
GEORGE T. DAVIS,
FRED W. SHIELDS,
JAMES D. GRAHAM, JR.,
DAYTON M. HARRINGTON,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 317

FRIEDRICH FLICK, PETITIONER

v.

LOUIS A. JOHNSON, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 181-185) is reported at 174 F. 2d 983. The opinion of the District Court (R. 16-20), is reported at 76 F. Supp. 979.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1949 (R. 186). On July 19, 1949, the Chief Justice by order extended the time for filing a petition for a writ of certiorari to Septem-

ber 8 (R. 191) when the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the District Court for the District of Columbia has power to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of a tribunal established pursuant to Allied Control Council Law No. 10 and United States Military Government Ordinance No. 7, imposed after trial and conviction for war crimes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 9, cl. 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article II, § 2 of the Constitution provides:

> The President shall be Commander in Chief of the Army and Navy of the United States, * * *.

28 U.S.C. 2241 provides:

> *Power to grant writ*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

STATEMENT

On March 15, 1948, a petition for a writ of habeas corpus was filed in the United States District Court for the District of Columbia on behalf of the petitioner, Friedrich Flick (R. 2-11). Petitioner is a German national and is presently confined in the American zone of occupation in Germany, in the custody of the United States Army (R. 14). The writ was sought to be directed to the Secretary of Defense, the Secretary of the Army, the Provost Marshal General of the Army, the Commanding General, European Command, United States Occupied Zone of Germany "and subordinates in command" (R. 10).[1]

Flick is confined pursuant to a sentence imposed by United States Military Tribunal IV, sitting in Germany, after his trial and conviction on charges of war crimes. In the petition for a writ of habeas corpus, it was alleged that the Tribunal was not legally constituted, that Flick was denied a fair trial as guaranteed by the Constitution of the

[1] Since, under Executive Order No. 10062, dated June 6, 1949 (14 F.R. 2965), and action taken pursuant thereto, governmental functions of the United States in Germany have been assumed by the Department of State, the ultimate control over petitioner's custody rests in the United States High Commissioner who is under the direction of the Secretary of State. Accordingly, unless the Secretary of State can be substituted as a party, this case has become moot.

United States and that his trial was not conducted in accordance with the United States' Articles of War, and that "the acts of which Petitioner was found guilty * * * do not constitute offenses against the United States of America or against the Law of Nations." The District Court dismissed the petition, holding that it lacked jurisdiction to issue the writ of habeas corpus where, as here, the petitioner was detained without the territorial jurisdiction of the court (R. 16-20).[2]

On appeal, the Court of Appeals for the District of Columbia affirmed the order of the District Court dismissing Flick's petition for a writ of habeas corpus (R. 186). In doing so, however, the Court of Appeals based its decision upon different grounds than those relied upon by the District Court. Citing its earlier decision in *Eisentrager* v. *Forrestal*, 174 F. 2d 961, now pending before this Court on petition for a writ of certiorari, No. 306, the Court of Appeals stated that the District Court for the District of Columbia was not deprived of power to issue the writ of habeas corpus by the circumstance that the petitioner was detained in Germany without the territorial jurisdiction of the District Court; but it nevertheless affirmed the order of the District Court because it found that the tribunal which tried and convicted Flick was not a tribunal of the United States and that therefore, pursuant to *Hirota* v. *MacArthur*,

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[2] The District Court's decision was rendered shortly before the decision of this Court in *Ahrens* v. *Clark*, 335 U. S. 188.

338 U. S. 197, its judgment was not reviewable by the District Court. The Court of Appeals stated (R. 184-185):

> If the court was not a tribunal of the United States, its actions cannot be reviewed by any court of this country. (*Hirota* v. *MacArthur, supra.*) If it was an international tribunal, that ends the matter. We think it was, in all essential respects, an international court. * * *
>
> * * * * * * *
>
> Concededly, the International Military Tribunal, established under the London Agreement, was a court of international character. How, then, can it be said that Military Tribunal IV was not of the same character, with its existence and jurisdiction rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council? * * *

ARGUMENT

The Government believes that the decision of the court below in affirming the dismissal of the petition for a writ of habeas corpus is sustainable upon any one of the following grounds:

1. That under this Court's decision in *Ahrens* v. *Clark*, 335 U. S. 188, the District Court is without power to issue the writ because the petitioner is detained outside of the territorial jurisdiction of that court;

2. That the petitioner as a non-resident enemy alien possesses no substantive legal rights which are enforceable in courts of the United States;

3. That the establishment of the tribunal which tried the petitioner, and his trial, conviction and detention pursuant to sentence by that tribunal are consequences of the foreign and military policy of the United States as embodied in international agreements, and do not present justiciable issues.

Propositions 1 and 2, above, are set forth in the Government's petition for a writ of certiorari in *Johnson* v. *Eisentrager,* No. 306, this Term, to which we respectfully refer the Court without repetition here. The third basis for sustaining the decision below which is sufficient in and of itself apart from the questions presented in the *Eisentrager* case, is discussed hereafter.

The apprehension, trial, and punishment of war criminals has been a major war aim and is a part of the basic post-surrender policy of all the nations participating in the war against the Axis. In the words of President Roosevelt, "when victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders, in Europe and in Asia" (9 Dept. of State Bull., No. 214, p. 62, July 31, 1943). In a resolution dealing with Nazi atrocities, Congress declared, early in 1943, that it was its sense "that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible." Conc. Res. of March 18, 1943, 57 Stat. 721. This

Court has recognized that the punishment of war crimes is an important incident to the conduct of war. *Ex parte Quirin*, 317 U. S. 1, 8; *In re Yamashita*, 327 U. S. 1, 11.

The development by the nations allied against Nazi Germany of a joint war crimes policy began with the Tripartite Declaration of Moscow on German Atrocities in 1943. 9 Dept. of State Bull. 310. The implementation of that policy began with the London Agreement and Charter of the International Military Tribunal of August 8, 1945. By the London Agreement (of which the Charter was a part), the governments of the United States, France, Great Britain and the Soviet Union provided for the establishment of the International Military Tribunal composed of members designated by each of the four signatory governments, defined the substantive law to be applied by the International Military Tribunal under the headings of crimes against peace, war crimes, and crimes against humanity, and provided for a prosecution staff representing the four governments. The President thereupon designated Mr. Justice Jackson to act as chief prosecutor on behalf of the United States, and Mr. Francis Biddle as the American member of the Tribunal.

The International Military Tribunal conducted one trial involving the principal Nazi leaders, Goering and others. In view of the close similarity between the origin and composition of the Tribunal to that of the International Military Tribunal for the Far East, it is clear that the former,

like the latter, was "not a tribunal of the United States" and that its judgments too are in no way reviewable by the courts of the United States. *Hirota* v. *MacArthur*, 338 U. S. 197.

On December 20, 1945, shortly after the beginning of the trial before the International Military Tribunal, the Allied Control Council for Germany enacted Control Council Law No. 10 (R. 43-49). The Control Council for Germany was created as a quadripartite body consisting of representatives of the United States, Great Britain, France, and the Soviet Union. In the Berlin Declaration, June 5, 1945, those four governments announced as follows:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. [12 State Dep't. Bull. 1051]

On the same date, the four governments announced the creation of the Control Council as follows:

> 1. In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Gov-

ernments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a political adviser.

2. The Control Council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole. [12 State Dep't. Bull. 1054]

It is thus clear that the decisions incorporated in laws of the Control Council have been the supreme law for Germany.

Control Council Law No. 10 states as its purpose "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Article I provides that the Moscow Declaration of October 30, 1943, and the London Agreement of August 8, 1945, "are made integral parts of this law." Article II recognizes and defines (a) Crimes against peace, (b) war crimes, and (c) crimes against humanity, substantially in the same terms as in the Charter of the International Military Tribunal. It also defines as a crime, "membership in cate-

gories of a criminal group or organization declared criminal by the International Military Tribunal." Paragraph 3 of Article II authorizes punishments ranging from death to deprivation of civil rights. Paragraph 4 of the Article states the principles that acting in an official capacity or in obedience to the orders of a superior does not free a person from responsibility for a crime.

Article III of Control Council Law No. 10 provides, *inter alia,* that "Each occupying authority, within its Zone of occupation, (a) shall have the right to cause persons within such zone suspected of having committed a crime, * * * to be arrested * * *; (d) shall have the right to cause all persons so arrested * * * to be brought to trial before an appropriate tribunal." Paragraph 2 of Article III provides (R. 46) that:

> The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

The other provisions of Control Council Law No. 10 deal largely with the delivery of defendants

and the availability of witnesses from one occupation zone to another.

Acting under Control Council Law No. 10, the Military Governor of the United States Zone of Occupation on October 18, 1946, issued Ordinance No. 7 (R. 20-29) "to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein contained shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses."

Article II of Ordinance No. 7 provides in part as follows (R. 20-21):

> (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.
>
> (b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this

Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

(c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

Article XV provides that the judgments of the tribunals as to the guilt or innocence of the accused shall be final and not subject to review. Article XVI authorizes such a tribunal to impose, upon conviction, one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10. Article XVII provides that except in cases tried by joint zonal courts "the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof." Also, Article XVIII provides that "No sentence of death shall be carried into execution

unless and until confirmed in writing by the Military Governor."

Other provisions of Ordinance No. 7 prescribe the procedure to be followed by the tribunals, and provide for a Central Secretariat to assist the tribunals.[3]

By a series of executive orders, the President has designated various American citizens to act as members and alternates on the military tribunals established by Ordinance No. 7. Most of these persons have been judges or former judges of American state courts. Typical of these executive orders is the first one, Executive Order 9813, of December 20, 1946 (11 F.R. 14607), which reads in part as follows:

> By virtue of the authority vested in me by the Constitution and the statutes, and as President of the United States and Commander in Chief of the Army and Navy of the United States, and in the interest of the military and foreign affairs functions of the United States, it is ordered as follows:
>
> 1. I hereby designate Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington, Harold L. Sebring, Associate Justice of the Supreme Court of the State of Florida, Johnson Tal Crawford, Judge of a District Court of the State of

[3] Ordinance No. 7 was amended by Ordinance No. 11, effective February 17, 1947, principally to provide for a supervisory committee of the presiding judges and for joint sessions of the tribunals.

Oklahoma, as the Members, and Victor C. Swearingen, former Special Assistant to the Attorney General, as the Alternate Member, of one of the several military tribunals established by the Military Governor for the United States Zone of Occupation within Germany pursuant to the quadripartite agreement of the Control Council for Germany, enacted December 20, 1945, as Control Council Law No. 10, and pursuant to Articles 10 and 11 of the Charter of the International Military Tribunal, which Tribunal was established by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, for the trial and punishment of major war criminals of the European Axis. Such members and alternate member may, at the direction of the Military Governor of the United States Zone of Occupation, serve on any of the several military tribunals above mentioned.

2. The Members and the Alternate Member herein designated shall receive such compensation and allowances for expenses as may be determined by the Secretary of War and as may be payable from appropriations or funds available to the War Department for such purposes.[4]

[4] Similar designations were made by the following Executive Orders: 9819—Jan. 10, 1947 (12 F.R. 205); 9827—Feb. 21, 1947 (12 F.R. 1215); 9852—May 15, 1947 (12 F.R. 3183); 9858—May 31, 1947 (12 F.R. 3555); 9868—June 24, 1947

The members thus designated were assigned to tribunals by the Military Governor.

On January 16, 1946, the President, by Executive Order 9679 (11 F.R. 703 (R. 53-54) vested the Chief of Counsel, Mr. Justice Jackson, with the additional authority to proceed before United States military or occupation tribunals, and provided that upon his vacation of office a Chief of Counsel be appointed by the United States Military Governor for Germany. On October 24, 1946, General Order No. 301 (R. 55) announced the transfer of the Office of Chief of Counsel for War Crimes to the Office of Military Government (U. S.) for Germany and the appointment of Brigadier General Taylor as Chief of Counsel.

Both the Military Governor in issuing Military Government Ordinance No. 7, and the President in designating persons to serve on the tribunals established by the Ordinance, expressly indicated that they were implementing Control Council Law No. 10. Moreover, Article X of Ordinance No. 7 provided that the tribunals to be established thereunder should be bound by certain determinations and findings of the International Military Tribunal in Case No. 1, Goering, et al. (R. 25). What Ordinance No. 7 did was to provide military tribunals and a procedure for the trial of charges of war crimes as defined in Control Council Law

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(12 F.R. 4135); 9882—Aug. 7, 1947 (12 F.R. 5417); 9917—Dec. 31, 1947 (13 F.R. 26).

No. 10. All of this was in implementation of the agreements between the Allies for the punishment of war crimes.

Military Tribunal IV, which tried, convicted and sentenced petitioner, was established in accordance with Control Council Law No. 10 and Military Government Ordinance No. 7. Petitioner was charged by indictment with the following offenses, either as a principal, accessory or other participant: enslavement of labor (Count 1), plunder of property (Count 2), persecution on political, racial or religious grounds (Count 3), and support of groups or organizations declared criminal by the International Military Tribunal (Count 4) (R. 115-130). He was found guilty under Counts 1, 2 and 4 (R. 56-102), and was sentenced to seven years imprisonment (R. 15).

Control Council Law No. 10, in authorizing the trial of any person in a zone of occupation on charges of war crimes as defined in that Law, is law for Germany and German nationals in Germany. The Control Council could have provided for tribunals composed of representatives of the four occupying powers, or it could, as it did (R. 46), authorize such trials in German courts. Instead it authorized the trial of such charges by tribunals and under procedures to "be determined or designated by each Zone Commander for his respective Zone." It is well established that the President and his military commanders may estab-

lish courts not provided for by the Articles of War and confer upon these courts civil or criminal jurisdiction. *Leitensdorfer* v. *Webb,* 20 How. 176; *The Grapeshot,* 9 Wall. 129; *Mechanics' & Traders' Bank* v. *Union Bank,* 22 Wall. 276. Admittedly, the President, or the military commanders who represent him, can join with allied governments in establishing an international tribunal to implement the joint war crimes policy of the United States and its allies. *Hirota* v. *MacArthur, supra.* Similarly, there is no reason why the President or those representing him could not agree with our Allies on implementation of the Allied war crimes policy by tribunals to be established by each Zone Commander.

Here, the United States Zone Commander, with the obvious approval of the President, established military tribunals to implement the Allied war crimes policy embodied in Control Council Law No. 10. These tribunals were designated as *military tribunals* in Ordinance No. 7, and they were in fact such, since they were created in the exercise of the power to govern occupied territory. Without more, the fact that the tribunal which tried petitioner is a military tribunal would limit the scope of review to the issues which may be raised in habeas corpus to challenge the jurisdiction of an American military tribunal. Those issues have been repeatedly stated as (1) was the tribunal legally established, (2) did it have jurisdiction of

the offense and the person, and (3) did it impose a sentence within its powers. *In re Yamashita*, 327 U. S. 1, 8-9, and cases cited there. The answer here is that Control Council Law No. 10 authorized the creation of Military Tribunal IV which tried petitioner and that Control Council Law No. 10 conferred upon that tribunal jurisdiction to try petitioner for the offenses with which he was charged and to impose upon him the sentence which he received.

The Government submits that Control Council Law No. 10 is not open to challenge in the courts of the United States. That law, like other arrangements which the President made or may make with our wartime allies for the government of occupied enemy territory, derives from the President's constitutional powers as commander in chief of the armed forces of the United States and as the organ of our foreign relations. In the absence of applicable constitutional or statutory[5] limitations, the President's exercise of these powers involves only political questions.

Petitioner would find such statutory limitations in the Articles of War, and he contends (R. 5) that Articles 25 and 38 in particular were applicable to his trial by Military Tribunal IV. The trial of an enemy combatant before an American military commission is not governed by the Articles of

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[5] Whatever may be the powers of Congress in this field, it has not acted.

War. *In re Yamashita,* 327 U. S. 1, 19-20. It follows that petitioner, an enemy non-combatant, need not be tried in accordance with the Articles of War.

While petitioner also asserts that he was denied "the fair trial guaranteed by the Constitution of the United States," it seems clear that the specific procedural guarantees of the United States Constitution have no application to the trial of Germans in Germany pursuant to Control Council Law No. 10. In the first place, it is difficult to conceive that all of the arrangements which the powers occupying Germany make either collectively or singly for its government generally or for the punishment of war crimes are subject to the limitations of the domestic law of the occupying powers. In the case of the United States, the proposition is incredible, since it has been long and repeatedly held that the Constitution has only a limited application to territory which has been annexed by the United States, but not incorporated into the United States. *Dorr* v. *United States,* 195 U. S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298. Here, the United States and the other powers occupying Germany have disclaimed any intention to annex Germany. Under the conditions of a temporary military occupation, it is difficult to fix upon any one provision of the Constitution which is applicable to enemy aliens residing in territory so occupied. As this Court put it in *Neely* v. *Henkel,*

180 U. S. 109, 122, the guarantees of the Constitution "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." In any event, the same invocation of the Constitution by an enemy alien was made without success in the *Yamashita* case.

In brief, therefore, we believe that all of the elements of jurisdiction for petitioner's trial by Military Tribunal IV were conclusively determined by Control Council Law No. 10. No other issues are open to challenge in courts of the United States for, as this Court has held: "We do not here appraise the evidence on which petitioner was convicted. * * * [the] rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities." *In re Yamashita,* 327 U.S. at pp. 17, 23. These rules, applicable to the trial of enemy aliens before an American Military Commission, apply *a fortiori* to the trial of enemy aliens before tribunals established to implement the Allied war crimes policy embodied in Control Law No. 10.

If, as the Government contends, Control Council Law No. 10 conclusively establishes the jurisdiction of Military Tribunal IV which tried petitioner, then it is unnecessary to characterize that tribunal as an international tribunal. We believe, however, that the court below was justified in con-

cluding that the Tribunal in essential respects was international in character. As petitioner points out (Pet. pp. 61-63), the tribunal here involved differs from that examined by this Court in *Hirota* v. *MacArthur, supra,* in several respects. For example, the tribunal which tried petitioner consisted of three American nationals, while Hirota and his codefendants were tried by a tribunal composed of judges from 11 countries. We think the court below properly held that such formal characteristics were not controlling, but rather that inquiry must be made into "the source of its power and jurisdiction to determine whether it was a court of the United States" (R. 182). As pointed out above, Military Tribunal IV derives its jurisdiction over petitioner from Control Council Law No. 10, just as the International Military Tribunal derived its jurisdiction from the London Agreement. Giving effect to that Law, and to the President's undoubted power to provide for its implementation in the United States zone of occupation, we do not see why it should make any difference whether the tribunal was staffed with Americans, or allied nationals or even Germans. At the least, the tribunal is an instrument created in the exercise of the President's constitutional powers to wage war and to govern occupied territory, for the purpose of carrying out international agreements which were within his powers to make. The fact that the Allied Governments decided to carry out their war crimes

program through judicial proceedings, did not mean that tribunals created to execute that policy become tribunals of the United States in the sense that their judgments are reviewable by national courts of the United States. Instead, so far as concerns the courts of the United States, the judgments of these military tribunals are as much an implementation of the foreign and military policy of the United States as was American participation in the enactment of Control Council Law No. 10. In this sense, therefore, we believe that Military Tribunal IV which tried petitioner was, as the court below held, not a tribunal of the United States. And, in this sense, too, it is not necessary to characterize the Tribunal as an international tribunal in order to reach that result.

CONCLUSION

The judgment of the court below is correct. Regardless of the ultimate disposition of *Johnson* v. *Eisentrager,* No. 306 this Term, in which the Government seeks certiorari, the result reached below in the present case is correct and there is no need for further review here.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 317

FRIEDRICH FLICK,

Petitioner,

v.

LOUIS A. JOHNSON, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Friedrich Flick, respectfully prays for a rehearing and for the issuance of a writ of certiorari to review the order and judgment of the United States Court of Appeals for the District of Columbia Circuit, dated May 11, 1949, which affirmed an order of the United States District Court for the District of Columbia dismissing his petition for writ of habeas corpus.

Prior Determinations

The District Court ruled that it lacked jurisdiction to entertain the petition on the *sole* ground that petitioner was confined outside the territorial bounds of the District

of Columbia. The Court of Appeals held that the District Court *did have* jurisdiction and then itself determined the controversy upon the merits without remanding the case to the District Court for hearing.

On November 14, 1949, this Honorable Court denied a petition for a writ of certiorari, Mr. Justice Black dissenting and Justices Jackson and Douglas taking no part. *Flick* v. *Johnson et al.*, 70 S. Ct. 158. The Chief Justice of the United States by order dated December 6, 1949, extended the time for filing this petition for rehearing to and including December 27, 1949.

Reasons for Allowance of Writ

The facts are as stated in the original petition. In the brief in support of said petition and the Government's brief in opposition, the question of the character of the tribunal which tried petitioner was discussed. Other important questions not there specifically raised, although available and alluded to by petitioner, are here presented.

I. Regardless of the character of the court which tried petitioner, his detention by officials and agents of the United States is violative of the 5th Amendment of the United States Constitution. Aliens as well as citizens are entitled the protection of the due process clause of the 5th Amendment (*United States* v. *Pink*, 315 U. S. 203). Officials of the United States may not act as "jailors" or "wardens" and hold in confinement persons sentenced by the courts of a foreign jurisdiction—national, international, or military—and at the same time be immune from accountability for their actions. Mr. Justice Douglas, in his opinion in *Hirota* v. *MacArthur*, 338 U. S. 197, at page 204, forcefully expresses the contention of the petitioner. He said:

> "The fact that the tribunal has been set up by the Allied Powers should not of itself preclude our inquiry. Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. Our writ would run not to an official of an

Allied Power but to our own official. We would want to know not what authority our Allies had to do what they did but what authority our officials had.

If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well."

To deny judicial inquiry by writ of habeas corpus directed to the American jailor is tantamount to holding that our Government may hold as prisoner any person convicted by the courts of a foreign or international jurisdiction and that the method whereby the conviction was obtained is immaterial. But what if the conviction was obtained by a process of judicial lynching? Or if there was no conviction at all? Has the unfortunate no remedy at law? Would a different rule be applicable in case the victim was an American citizen? Mr. Justice Douglas, in *Hirota* v. *MacArthur, supra*, posed several pointed questions on this subject. He said:

"Let me illustrate the gravity and seriousness of the conclusion of the Court.

(1) Suppose an American citizen collaborated with petitioners in plotting a war against the United States. The laws of the United States provide severe penalties

for such conduct. May that citizen be tried and convicted by an international tribunal and have no access to our courts to challenge the legality of the action of our representatives on it? May he, in the face of the safeguards which our Constitution provides even for traitors, have no protection against American action against him?

(2) Suppose an American citizen on a visit to Japan during the occupation commits murder, embezzlement, or the like. May he be tried by an international tribunal and have no recourse to our courts to challenge its jurisdiction over him?

(3) What about any other civilian so tried and convicted for such a crime committed during the occupation?

These are increasingly important questions as collaboration among nations at the international level continues. They pose questions for which there is no precedent. But we sacrifice principle when we stop our inquiry once we ascertain that the tribunal is international.

I cannot believe that we would adhere to that formula if these petitioners were American citizens. I cannot believe we would adhere to it if this tribunal or some other tribunal were trying American citizens for offenses committed either before or during the occupation. In those cases we would, I feel, look beyond the character of the tribunal to the persons being tried and the offenses with which they were charged. We would ascertain whether, so far as American participation is concerned, there was authority to try the defendants for the precise crimes with which they are charged. That is what we should do here."

The decision of the Court of Appeals for the District of Columbia Circuit and the ruling of this Honorable Court denying the petition filed in this case for a writ of certiorari necessarily requires that the questions propounded by the learned Justice be answered in the negative unless, of course, a different formula is applicable to Americans.

Never before have we considered the propriety of the restraint of liberty on the basis of the nationality of the prisoner. Nor ought we to do so now. It is respectfully contended that a serious and important question is raised involving the power of Americans to hold as prisoners persons condemned by international or foreign tribunals and that review by this Honorable Court is warranted.

II. The denial to the petitioner of an opportunity of presenting evidence, oral and documentary, in support of the petition for writ of habeas corpus is violative of due process and also violative of the express mandate of this Court.

The District Court ruled that it lacked jurisdiction to entertain the petition on the sole ground that the petitioner was confined outside the territorial bounds of the District of Columbia. The District Court also ruled that it would not take any evidence as it was not deciding the controversy on the merits. The Court of Appeals reversed the District Court on the jurisdictional question and decided the case on the merits without remanding to the District Court for hearing. The petitioner was thus deprived of an opportunity of presenting evidence and of a full and fair hearing on controverted issues.

It is elementary that such opportunity must be given to litigants in all proceedings including habeas corpus. (*Price* v. *Johnston,* 334 U. S. 266; *Waley* v. *Johnston,* 316 U. S. 101; *Walker* v. *Johnston,* 312 U. S. 275).

In *Price* v. *Johnston, supra,* at page 291, this Court said, "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. cf. *Kennedy* v. *Selas Mason Co.,* 334 U. S. 249."

III. Pursuant to Rule 33 of the Revised Rules of this Court, petitioner further contends that there are "intervening circumstances of substantial or controlling effect" which warrant reconsideration of the petition for certiorari heretofore filed.

a) Since the filing of said petition, this Honorable Court granted certiorari in the case of *Eisentrager et al.* v. *Forrestal et al.*, No. 306, October 1949 Term of this Court. Identical questions, involving the jurisdiction of the United States District Court for the District of Columbia to entertain petitions for writs of habeas corpus in cases where petitioners are detained outside the United States and the rights of a non-resident enemy aliens to obtain such writs, were raised in both cases. Until the *Eisentrager* case is determined, the answers to these questions are in doubt (*Aherns* v. *Clark*, 335 U. S. 188). If this Honorable Court reverses the *Eisentrager* case on one or both of the questions presented, it follows that the ruling on the merits in this case was improperly made either because of lack of jurisdiction or because petitioner lacked capacity to sue. But a decision on the merits is recorded and is being regarded as a precedent. Since this Court has presently pending before it the question of the power of the lower courts to even consider such petitions, it is respectfully urged that in the interest of uniformity of decisions that certiorari be granted in this case.

b) Since the filing of the original petition for certiorari, in this case it has come to the attention of counsel that the execution of twenty-nine death sentences was stayed by the Secretary of the Army pending determination thereof. This case is apparently being regarded by the respondent as a test case despite the fact that petitioner herein was never given a hearing on the merits (R. 17, 20; Orig. Petition for Cert., 69-75). Counsel for the petitioner herein do not represent any of the condemned men and have no

interest, directly or indirectly, in their cases. But the death sentence imposed on so large a number of persons, certainly transcends the fate of the petitioner Flick, who was sentenced to seven years' imprisonment.

Determination of Flick's case appears to involve more than his case alone, and involves questions of substance never before passed upon by this Honorable Court. Reconsideration is respectfully prayed for.

c) Since the filing of the original petition for certiorari, the Government admitted for the first time, in its brief in opposition, that the tribunal which tried Flick was an American created Military Court (Govt.'s brief, p. 17), and that it was "unnecessary to characterize that Tribunal as an international tribunal." (Govt.'s brief, p. 20).

Despite their admission that the tribunal was an American creature and that it was not necessary to characterize it as an international tribunal, the respondents assert that it was "not a Tribunal of the United States" (Govt.'s brief, p. 22). It seems that the respondents have taken variant and divergent views on this subject and to the present day are unable to take a position without equivocating.

The failure of this Court to grant the petition for certiorari leaves undetermined the nature and true character of the court which tried petitioner. The judges who sat upon the Court first ruled that it was an American tribunal—national in character. At the end of the trial, adopting the argument of the prosecution, they ruled that it was not an American court but an "international tribunal" (Orig. Petition for Cert., pp. 55-65). In the Court of Appeals, the respondents argued that the tribunal was international because it was applying international law (Orig. Petition for Cert., pp. 65-75). The Court of Appeals abandoned or disregarded that argument and held that the tribunal was "international" because certain language in Control Council Law No. 10 authorized the Zonal Commanders to create international courts. Control Coun-

cil Law No. 10, on its face indicates that no such authorization was given, nor can it be spelled out by inference (Orig. Petition for Cert., pp. 70-75). It was only after the original petition for certiorari was filed that the respondents abandoned their earlier contention and argued that it was not necessary to characterize the tribunal which tried petitioner as an "international tribunal" (Govt.'s brief, pp. 20, 22). If the tribunal was not an international court and not a U. S. military tribunal, then may we ask what was it? Many scholars and learned authorities on international law have determined that the tribunal was not an international court. Presently even the Government does not claim that it was. The petitioner has always contended that it was a U. S. military tribunal, although allegedly applying international law. In view of the fact that it is not longer contended that Tribunal IV which tried petitioner was international, the *Hirota* case on which the Court of Appeals relied can not be considered as an authority, since that case involved a trial before an international tribunal.

The questions raised in the original petition for certiorari and on this petition for rehearing are, as Mr. Justice Douglas pointed out in *Hirota* v. *MacArthur, supra*, of a grave and serious nature involving federal questions of substance not heretofore determined by this Honorable Court and which warrant this court's consideration.

Prayer for Relief

For the reasons hereinabove stated and for those stated in the original petition for a writ of certiorari and the brief submitted in support thereof, it is respectfully prayed that a rehearing be granted and that upon such rehearing the order dated 14 November 1949 denying certiorari be vacated, and that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, and that petitioner be granted such other further and equitable relief as this court may deem just and proper.

Counsel certify that this petition for rehearing is presented in good faith and not for delay, and that it is confined to substantial grounds available to petitioner although not previously presented, and to intervening circumstances of substantial or controlling effect.

Respectfully submitted,

JOSEPH S. ROBINSON,
EARL J. CARROLL,
GEORGE T. DAVIS,
FRED W. SHIELDS,
JAMES D. GRAHAM, JR.,
DAYTON M. HARRINGTON,
Attorneys for Petitioner.